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The Constitution in Two Dimensions: A  
Transaction Cost Analysis of Constitutional  
Remedies.

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# The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies.

Eugene Kontorovich

## Abstract

This Article reveals the underappreciated role of liability rules in constitutional law. Conventional constitutional theory insists that constitutional entitlements require, by their nature, property rule protection. That is, they can only be taken with the owner's consent; nonconsensual takings can be enjoined. This Article shows that many constitutional values are in fact protected by liability rules, which allow for forced transfers followed by payment of compensation. Substantive entitlements form one dimension of constitutional law. The various ways in which they are protected against transfers form the second dimension. The full picture of constitutional law only emerges from looking at both.

The Article locates liability rules in diverse areas such as the First Amendment prior restraint doctrine, the Third Amendment, Fourth Amendment search and seizure rules, the Due Process Clauses, the Takings Clause of the Fifth Amendment, the Self-Incrimination Clause of the Fifth Amendment, and the Excessive Bail Clause of the Eighth Amendment. Thus constitutional theory's insistence on property rule protection fails account for how some constitutional values are actually protected. This Article develops a richer understanding of the relationship between constitutional remedies and constitutional entitlements. The transaction cost perspective on constitutional law reveals previously unnoticed connections between various doctrines, and provides a new criterion for evaluating their strengths and weakness.

This Article also presents new evidence that the Constitution does not require property rule protection and can be satisfied with liability rules. It shows that the

oft-overlooked Third Amendment explicitly mandates property rule protection for the entitlement it defines. This property rule, together with the Takings Clause's explicit liability rule, shows that for other entitlements the Constitution does not require any particular form of protection. The one explicit property rule and the one explicit liability rule define the second dimension in constitutional lawlengths and weakness.

# THE CONSTITUTION IN TWO DIMENSIONS: A TRANSACTION COST ANALYSIS OF CONSTITUTIONAL REMEDIES

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**By Eugene Kontorovich\***

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*This Article also presents new evidence that the Constitution does not require property rule protection and can be satisfied with liability rules. It shows that the oft-overlooked Third Amendment explicitly mandates property rule protection for the entitlement it defines. This property rule, together with the Takings Clause's explicit liability rule, shows that for other entitlements the Constitution does not require any particular form of protection. The one explicit property rule and the one explicit liability rule define the second dimension in constitutional law.*

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## TABLE OF CONTENTS

INTRODUCTION .....	3
I. TRANSACTION COSTS FOR CONSTITUTIONAL RIGHTS.....	8
A. PROPERTY RULES, LIABILITY RULES, AND CONSTITUTIONAL TRANSACTIONS. ....	9
B. VALUATION DIFFICULTIES. ....	13
C. LIBERTY ENTITLEMENTS.....	16
1) <i>Ex ante transaction costs usually low</i> .....	17
2) <i>Jury service: an example of high ex ante transaction costs?</i> .....	18
3) <i>Ex post transaction costs always high</i> .....	20
4) <i>The limits of liability rules for liberty entitlements</i> . ....	22
D. BALANCING CONSTITUTIONAL TRANSACTION COSTS.....	23
II. THE THIRD AMENDMENT AND THE TAKINGS CLAUSE .....	28
A. LIABILITY AND PROPERTY RULES IN THE TAKINGS CLAUSE. ....	30
1) <i>Forms of protection</i> . ....	30
2) <i>Transaction cost justification</i> . ....	32
B. PROPERTY AND LIABILITY RULES IN THE THIRD AMENDMENT. ....	34
1) <i>Forms of protection</i> . ....	34
2) <i>Transaction cost justification</i> . ....	35
C. THE RELATIONSHIP BETWEEN THE THIRD AND FIFTH AMENDMENT. ....	38
D. THE THIRD AMENDMENT AND THE PERMISSIBILITY OF LIABILITY RULES. ....	41
III. STRUCTURAL LIABILITY RULES.....	43
A. PROCEDURAL DUE PROCESS .....	43
1) <i>The sufficiency of post-deprivation process</i> . ....	43
2) <i>Transaction cost justification</i> . ....	45
3) <i>Liberty entitlements</i> . ....	47
B. FOURTH AMENDMENT SEARCH AND SEIZURE. ....	48
1) <i>A de facto liability rule</i> . ....	48
2) <i>Between the Third and Fifth Amendments: a possible de jure liability rule</i> . ....	50
3) <i>Liberty entitlements</i> . ....	53
IV. LIABILITY RULES FOR GOVERNMENTAL ENTITLEMENTS.....	54
A. THE CONSTITUTION’S “RULE FOUR.” .....	56
B. PRIOR RESTRAINT. ....	57
1) <i>The doctrine</i> . ....	57
2) <i>Transaction costs justification</i> .....	58
3) <i>Flipping the entitlement</i> .....	62
C. BAIL. ....	66
1) <i>The liability rule</i> . ....	66
2) <i>Transaction cost justification</i> . ....	68
3) <i>Flipping the entitlement</i> .....	71
CONCLUSION.....	73

## INTRODUCTION

Constitutional law exists in two fundamentally distinct dimensions, only one of which is commonly recognized. The first dimension is that of substantive entitlements. The second dimension involves remedies -- the manner in which entitlements are protected against forced transfers or destruction. A constitutional norm can only be fully understood when viewed simultaneously in both dimensions, where rights and remedies interact to create the norm as it is experienced in practice.

The creation of a substantive entitlement does not dictate how it should be protected, as Guido Calabresi and A. Douglas Melamed's article *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral* (hereinafter "*The Cathedral*") famously showed in the private law context.<sup>1</sup> Entitlements can be protected through property rules or through liability rules. Under a property rule, an entitlement can only be transferred with the owner's consent. The entitlement must be purchased in advance of a transfer; injunctions and punitive damages are available to prevent coercive takings. Liability rules, by contrast, permit nonconsensual takings of entitlements, but award the original owner compensatory money damages in a subsequent judicial proceeding. The choice between liability and property protection depends on whether transaction costs are high enough to prevent voluntary transfers of entitlements when such transfers would be socially efficient. If transaction costs are relatively high, liability rules work best.

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<sup>1</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter, Calabresi & Melamed, *The Cathedral*].

Constitutional theory has almost entirely ignored this two-dimensional understanding of rights and their relation to remedies.<sup>2</sup> Constitutional entitlements are commonly thought to require, by their very nature, nothing short of property rule protection.<sup>3</sup> In this view, the government can never lawfully take constitutional rights without the owner's consent. Someone facing a nonconsensual rights deprivation is presumptively entitled to an injunction.<sup>4</sup> Money damages for constitutional violations are resorted to as a second-best remedy when it is too late for an injunction. However,

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<sup>2</sup> One notable exception is Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143 (1999). While Prof. Merrill considers the possibility of constitutional liability rules as a theoretical exercise, the present Article actually identifies examples of existing constitutional liability rules.

<sup>3</sup> See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 115 & n.112 (1997) (arguing that constitutional rights should not be transformed into "takings-clause-like 'liability' rights" because it would allow the government to "cynically treat violations of sacred constitutional rights merely as the cost of doing business"); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. CR.-CL. L. REV. 7, 19-20 & n.36 (1999) (arguing the "only conceivable notion of constitutional rights" entails "prophylactic protection from potential infringements," and that the Warren Court subscribed to such a property-rule view of constitutional rights); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 93 (1988); Jules L. Coleman & Judy Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339-40 (1986) ("If rights entail or secure liberties. . . [t]he very idea of a 'liability rule entitlement,' that is of a right secured by a liability rule, is inconceivable."); James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1278 n.21 (1983) ("Damages [for unlawful searches and seizures] would be a kind of forced exchange, and however appropriate that may be in a commercial context where all things are in principle exchangeable, it would be incompatible with the idea of a right specifically against the government."); Walter F. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (arguing that while liability protection might be appropriate for private law rights, "it is inconsistent with a constitutional system").

<sup>4</sup> See *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.") (citing cases); *United States v. Stanley*, 483 U.S. 669, 690 (1987) (Brennan, J., concurring in part, dissenting in part) ("[C]onstitutional violation[s] may be enjoined if and when discovered."); *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388, 404 (1977) (Harlan, J., concurring) (noting the "presumed availability of federal equitable relief against threatened invasions of constitutional interests."); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (same); *Davis v. District of Columbia*, 158 F.3d 342, 1346 (D.C. Cir. 1998) (same). See also, Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1135 n.325 (2001) (observing that constitutional rights are presumptively protected by property rules); Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 1008 & n.205 (1998) ("In constitutional law...equitable relief has become the standard remedy for most constitutional violations, and one which is available essentially as a matter of right.").

*limiting* remedies to *ex post* money damages is widely thought of as incompatible with constitutional values.

In a previous article, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*,<sup>5</sup> I challenged this dominant view of constitutional law by showing that liability rules *can* be the best way of protecting constitutional rights in the same circumstances that recommend liability rules in private law – when transaction costs are high enough to block socially beneficial exchange. *Liability Rules for Constitutional Rights* demonstrated the *potential* utility of liability rules by pointing to a situation – mass detentions in emergencies – where transaction costs can render property rules dysfunctional. Thus *Liability Rules for Constitutional Rights* was primarily normative: it showed that a particular entitlement currently protected by property rules might, in some situations, be better suited to a liability rule.<sup>6</sup>

This Article has a broader agenda. It casts much of constitutional law in a new light by revealing how it *already* uses liability rules. The Article locates liability rules in the First Amendment prior restraint doctrine, the Third Amendment, Fourth Amendment search and seizure rules, the Due Process Clauses, the Takings Clause of the Fifth Amendment, the Self Incrimination Clause of the Fifth Amendment, and the Excessive Bail Clause of the Eighth Amendment. Thus constitutional theory's insistence on property rule protection fails to describe how constitutional values are actually protected. These doctrines and provisions take on new depth and meaning when one becomes aware

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<sup>5</sup> See Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) [hereinafter, Kontorovich, *Liability Rules*].

<sup>6</sup> Sovereign immunity may be a barrier to actions for money damages and thus to liability rules. Money damages are recoverable in suits against municipalities, *Bivens* suits against federal officers, and when the sovereign has waived its immunity, as the federal government has done for Takings claims. The discussion in this Article leaves immunity issues to one side.



of their liability rule component. The transaction cost perspective on constitutional law reveals previously unnoticed connections and similarities between various doctrines, as well as providing a new criterion for evaluating their strengths and weakness. An awareness of the transaction cost underpinnings of these doctrines should help courts to better administer them.<sup>7</sup>

In response to the widely-held view that the Constitution itself mandates property rule protection for all entitlements, this Article presents new evidence that liability rules are entirely consistent with the Constitution. It shows that the oft-overlooked Third Amendment *explicitly* mandates property rule protection for the entitlement it defines. It is the only constitutional provision to do so. This is essential to understanding constitutional remedies, yet it has heretofore gone unnoticed. The Third Amendment's explicit property rule, read together with the Takings Clause's explicit liability rule, shows that the Constitution does not *require* either type of protection for other entitlements. The one explicit property rule and the one explicit liability rule define the second dimension of constitutional law.

Part I sets up the theoretical foundations of the Article by explaining the concepts of liability and property rules, and their relation to transaction costs. It also introduces a concept essential for applying these in the constitutional context – the concept of *ex post* or “public” transaction costs. These are the costs attendant to judicially determining damages for rights violations, and they are generally higher for constitutional than for private law entitlements. Liability rules are appropriate when, roughly speaking, ordinary

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<sup>7</sup> To be sure, the choice between liability and property rules in constitutional law, as in private law, is not solely a function of transaction costs; it can also be a response to other types of concerns. But noting the difference in how entitlements are protected opens the door to understanding what, if anything, motivates the differential treatment.

transaction costs are high but *ex post* transaction costs are relatively low. *Ex post* transaction costs are particularly high for liberty entitlements, which explains why they are almost never protected by liability rules.

Part II discusses the only two constitutional entitlements that explicitly call for liability or property rule protection. This Part reveals how the Third Amendment explicitly announces a property rule for the entitlement it defines. The discovery of the Third Amendment's property rule has several important implications for constitutional law. It shows – when considered alongside the well-known *liability* rule in the Takings Clause -- that other constitutional entitlements can be protected by either property *or* liability rules, as the courts and Congress see fit. Part II also shows that the Third Amendment calls for liability rule protection in certain high-transaction cost circumstances. Thus the Constitution itself suggests that the decision about how an entitlement should be protected should turn at least in part on the transaction costs that would be involved in its transfer. Finally, this Part explains that the Third Amendment's property rule has important implications for the much-debated question of regulatory takings: it suggests that compensation is required for partial takings of property.

Part III shows how several constitutional provisions and doctrines create liability rules for individual rights. These doctrines allow the government to provide a judicial hearing only *after* it acts, thus creating *de facto* liability rules. This Part focuses on two examples: procedural due process under the Due Process Clauses, and Fourth Amendment search and seizure rules. The Supreme Court has held that the government does not violate due process entitlements if it provides remedies only after taking an entitlement. These “adequate postdeprivation remedy” cases create liability rule

protection for procedural due process rights. Similarly, under the Fourth Amendment, if the government is allowed to conduct unwarranted searches and seizures, a wrongful search will in practice have to be remedied with money damages, characteristic of liability rules.

Part IV explains how the *government's* entitlements are protected by liability rules in the free speech and bail contexts. The government can prohibit speech that falls outside the First Amendment's protection, such as obscenity. Thus the government has a substantive anti-speech entitlement. Yet under the prior restraint doctrine, this entitlement cannot be protected through injunctions, but only with *ex post* remedies. Similarly, the government has the power to detain criminal defendants until trial. Yet the Bail Clause of the Eighth Amendment effectively allows defendants to "buy out" the pre-trial detention entitlement. Part IV also examines whether these liability rules are justified by transaction costs. It concludes that the bail liability rule may be grounded in transaction costs, but the prior restraint liability rule is not.

## I. TRANSACTION COSTS FOR CONSTITUTIONAL RIGHTS

This Part explains liability rules, property rules and transaction costs, terms that will be used throughout the rest of the Article. These concepts have been explored in a vast body of private law literature since the publication of *The Cathedral*,<sup>8</sup> and so they

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<sup>8</sup> For some notable contributions in the law and economics literature, see Ian Ayres & Paul M. Goldbart, *Correlated Values in the Theory of Property and Liability Rules*, 32 J. LEG. STUD. 121, 123 (2003); Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 NW. U. L. REV. 267, 291-92 (2002); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 Yale L.J. 2149 (1997); Louis Kaplow & Stephen Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235 (1995); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 442 (1995); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027

are only briefly sketched in Part I.A.<sup>9</sup> Part I.A also explains what it means for a constitutional right to be transacted. Part I.B broadens and elaborates the concept of transaction cost to make it more relevant to constitutional entitlements. It explains that liability rules require a judicial valuation of the entitlement, which is itself costly. These are in effect of *ex post* transaction costs, that should be balanced against the *ex ante* transaction costs characteristic of property rules. Constitutional entitlements will generally be harder for courts to accurately value than private law entitlements. Part I.C pays special attention to liberty, which is one of the most difficult constitutional entitlements to monetize. As a result, liability rules will be more unwieldy for liberty than for other entitlements. Part I.D introduces formulae to determine when liability rule treatment is proper. It also presents a matrix that shows how combinations of *ex post* and *ex ante* transaction costs lead to liability rules for various constitutional entitlements.

#### **A. Property rules, liability rules, and constitutional transactions.**

A property rule prevents entitlements from being transferred or destroyed without the consent of the owner. Because only voluntary exchanges are possible under this rule, they are presumed to be efficient. Both parties gain from the transfer of rights (and society gains with them), or else they would not have bothered with the transaction. The price at which the entitlement is transferred incorporates any idiosyncratic elements of

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(1995). In the non-economic vein, two divergent perspectives can be seen in Coleman & Krauss, *supra* note 3, at 1339-40 (arguing that liability rules do not allow entitlements to create domains of individual autonomy); Dale Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837 (1997) (arguing that the distinction between a property and a liability rule concerns whether it is appropriate rather than whether it is possible to take an entitlement without the owner's consent).

<sup>9</sup> For concise descriptions of these concepts and reviews of the related literature, see Kontorovich, *Liability Rules*, *supra* note 5, at 763-68; Abraham Bell & Gideon Parchomovsky, *Liability Rules*, 101 MICH. L. REV. 1, 11-25 (2002); Carol M. Rose, *The Shadow of the Cathedral*, 108 YALE L.J. 2175 (1997).

value (such as sentimental value).<sup>10</sup> The property rule price is, by definition, the “true” value of the entitlement. Property rules ensure that entitlements wind up with their highest value user.

The advantages of property rules are realized only when transaction costs are low. Transaction costs can arise in myriad forms,<sup>11</sup> all involving departures from the ideal of perfectly competitive markets.<sup>12</sup> Transaction costs are commonly understood as costs of buying and selling, such as the cost of learning about the quality of goods and their prices; cost of reaching an agreement with a distant party or a party that drives a hard bargain (behaves strategically); the cost of writing and enforcing contracts, as well as the expected cost of the non-performance. In order to avoid circularity in the definition of the concept, one has to state in advance the circumstances that make these costs high or low.

Transaction costs are lower in territorially concentrated markets, in markets with large numbers of buyers and sellers, and markets for homogenous commodities and standard goods. The costs increase if small numbers of buyers and sellers are involved, if goods are customized or unique, or if the results of the deal are uncertain. Holdout, a particular type of transaction cost, occurs in situations where the uniqueness of each

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<sup>10</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1092.

<sup>11</sup> Surprisingly, law and economics scholars have yet to agree on a definition of transaction costs. For a description of these difficulties and a criticism of the reliance on transaction-costs in Coasean law and economics, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1674 (1989) (“When we turn to the theoretical definition of transaction costs, however, we encounter serious controversy among economists. Several economists have noted that the definition of transaction costs is elusive and contested.”). Measuring transaction costs is not easy either, at least for judges. See Todd J. Zywicki, *Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law And Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 969 (1996) (discussing “the inability to measure transaction costs”).

<sup>12</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1109-10 &n.39.

parcel being purchased by a developer allows sellers to behave strategically.<sup>13</sup> High transaction costs may cancel out the gains from exchange, and prevent otherwise efficient transactions from being consummated. Society has evolved many devices for lowering transaction costs so as to expand the amount of efficient exchanges. Liability rules is one of such devices.<sup>14</sup>

Liability rules allow a would-be buyer to bypass the original entitlement holder's consent, and instead to coercively take the entitlement. However, the taker must pay compensation in an amount established by a court in a subsequent action for damages by the original entitlement holder.<sup>15</sup> In the subsequent judicial proceeding, the court would attempt to award a sum that approximating the price that would have been paid under a property rule. The drawback of liability is that there is less confidence in the accuracy of a judicially-determined price than in a privately-determined one: approximating the market price is not always easy.<sup>16</sup> If damages underestimate the private value of the entitlement, it will over-encourage takings of entitlements, and if the damages are too high, it would over-deter takings. Erroneous damages would also distort the entitlement-holder's incentives. In either case, entitlements would not wind up in with their highest value user: the outcome will not be efficient.

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<sup>13</sup> Holdout is explained more extensively in the discussion of the Takings Clause, which is particularly concerned with avoiding this problem. *See* text accompanying notes 59-63, *infra*.

<sup>14</sup> *See* Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1106.

<sup>15</sup> *See id.* at 1107. The price of the entitlement can also be established by legislation, an administrative agency, or other third-party. *See* Bell & Parchomovsky, *supra* note 9, at 3 & n.8.

<sup>16</sup> This account leaves to one side the supposed psychic differences between liability and property rules, such as the displeasure people may experience at having an entitlement forcibly taken. This displeasure would ideally be compensable under a liability rule, though it is clear that monetizing such displeasure is also quite difficult.

A few words should be said about the “transaction” of constitutional entitlements because unlike those in private law, one does not normally think of them as being transacted.<sup>17</sup> A constitutional transaction occurs under a property rule when the government obtains a voluntary waiver of the individual’s rights. Such transactions can be done in exchange for some consideration from the government, as in the case of plea bargains, or gratis, without consideration, as is usually the case in consensual searches. Constitutional transactions within the meaning of this Article also occur when the government condemns an entitlement through the judicial process.<sup>18</sup> If the government does not secure a plea bargain, it can still seek a conviction; if it does not obtain consent to a search, it can seek a warrant. Similarly, in private law, forcible destruction of another’s property is a “transaction” for which the taker may be liable in tort for conversion. A transaction occurs regardless of whether the entitlement is transferred to the taker or destroyed by him,

The jury or judge can be seen as alternative sources of *ex ante* consent for a taking of constitutional entitlements. The “negotiation” with the jury is the process of proving the case beyond a reasonable doubt. The *ex ante* transaction costs are those of developing evidence and conducting a trial. Thus “constitutional transactions” under a property rule require the government to obtain the consent of the entitlement holder *or* a court *in advance*. This is not so different from the situation with private law entitlements. If Marshall believes that Taney’s farm belongs to Marshall, he can either negotiate with Taney out-of-court for a return of the land, or he can sue for possession. But because land

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<sup>17</sup> See Kontorovich, *supra* note 5, at 772 (explaining the concept of “constitutional transactions” in the criminal context).

<sup>18</sup> See Merrill, *supra* note 2, at 1143 (defining constitutional transactions as occurring when the government purchases, condemns, or “otherwise extinguish[es] constitutional rights”).

is protected by a property rule, Marshall cannot forcibly dispossess Taney without a prior court order.

### **B. Valuation difficulties.**

Liability rules require courts to put a monetary value on the taken entitlement. Doing so entails costs: both the costs of litigation, such as judicial salaries, legal fees and discovery. It also entails the costs of error arising from inaccurately assessed damages. These are the costs of doing the transaction through public rather than private processes.<sup>19</sup> This article will call the costs resulting from transferring entitlements under a liability rule “*ex post* transaction costs” to distinguish them from the traditional *ex ante* costs involved in voluntary transfers. *Ex post* transaction costs are a sum of administrative and error costs. Error arises from the difficulty of judicially determining the value of entitlements. The degree of error is measured by the difference between the judicial valuation of the entitlement and what the original entitlement holder would have sold it for. The cost of error arises from the inefficient incentives created by erroneous damages, which over-deter takings if set too high, and encourage too much taking if set too low.

When an entitlement is not traded in thick markets, or possesses elements of idiosyncratic value, it becomes more difficult and expensive to get an accurate judicial valuation. If the court errs in assessing damages it will result in undercompensation or overcompensation. Systematic error in either direction will create improper incentives. Thus the error costs of using liability rules increase as the difficulty of setting damages increases. The administrative costs increase too: a wider variety of evidence must be

<sup>19</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 766.



considered by the court when it deals with non-market entitlements than with entitlements that have a market-determined “price tag,” such as a commodity.

These considerations apply to liability and property rules in general. However, constitutional entitlements are, as a class, harder to value than most private law entitlements. First, there is no explicit market for most constitutional rights, and thus no obvious way to determine their value.<sup>20</sup> Since individual constitutional rights are only good against the government, the market for such rights are monopsonistic. Plea bargaining creates a thick market for liberty rights under cloud of title (that is, the liberty entitlements face possible condemnation through trial and conviction). Yet plea agreements would be poor measures of the monetary value of defendants’ liberty because the plea does not trade between money and liberty. Rather, it trades between liberty and the potential loss of more liberty. Some constitutional rights are particularly hard to value not simply because there is no market in the narrow sense that the government is not purchasing them like it purchases widgets and tanks, but rather because *no one* is purchasing them.

Second, constitutional entitlements are often inchoate. It is not always obvious what interests a particular entitlement protects and thus which interests are compromised by its taking.<sup>21</sup> Finally, there may be a high degree of variance in people’s subjective valuations of their constitutional entitlements, making it harder for courts to award truly compensatory damages for takings. Some constitutional entitlements are harder to value

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<sup>20</sup> See Merrill, *supra* note 2, at 1165 (“There is no established market price or other financial price for unreasonable government searches.”).

<sup>21</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 773.

than others, with liberty interests posing perhaps the greatest problems. Thus they are also discussed separately in Part I.C.

The somewhat metaphysical term “incommensurability” is often used to describe the difficulty of valuing inchoate and non-market entitlements. Incommensurability is one of the main objections against considering the potential of liability rules in constitutional law. The argument begins, correctly, by observing that certain entitlements are much more difficult to monetize than others. From this, it concludes that any regime that depends on monetizing them is fundamentally flawed. The argument has several weaknesses. It treats a continuous variable -- the magnitude of error in a damage award -- as discontinuous. Further, it does not consider this variable’s relation to others, such as the size of *ex ante* transaction costs.

Liability rules for takings of real property are uncontroversial because such entitlements are generally regarded as not incommensurable. Yet the market value of a house, which is the benchmark for just compensation, does not incorporate its sentimental worth to its present owners, an inchoate and unique value that is difficult to monetize. Indeed, “just compensation” for eminent domain, determined by market price, is usually less than the land was worth to owners. Had the market price exceeded their private valuation, they would have already sold the property themselves.<sup>22</sup> This does not mean that real property is incommensurable. Usually, only a small portion of the value of the

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<sup>22</sup> See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7<sup>th</sup> Cir. 1988) (Posner, J.):

Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are “intramarginal,” meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not “for sale”). . . . The taking in effect confiscates the additional (call it “personal”) value that they obtain from the property.

entitlement to its owner will be idiosyncratic or above the market value. The greater the proportion of private to market value, the greater the problems of judicial valuation. Thus “incommensurability” is not a discrete quality that some entitlements possess that immunizes them from standard transaction cost analysis. Rather, commensurability is a continuous variable. Even the degree of valuation error, in itself, yields no information about the desirability of liability rules. It must be considered in relation to the likely social gains the use of liability rules would allow, and the costs and benefits of the property rule alternative.

### C. Liberty entitlements.

Takings of material property sometimes receive compensation and sometimes they do not.<sup>23</sup> Liberty entitlements are generally regarded as more important or fundamental than property entitlements. Yet in the few situations where takings of liberty are permitted, such as military conscription or jury service, compensation is not constitutionally required.<sup>24</sup> The switch is always drastic, from a robust property rule to nothing.<sup>25</sup> To be sure, outside of the criminal context, *ex ante* transaction costs can prevent efficient outcomes under property rules for liberty entitlements. Indeed, when uncompensated takings of liberty are allowed, it is usually because *ex ante* transaction

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<sup>23</sup> See Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1333 & n.1 (1991) (observing the existence of a “gray area [of cases] where in which it will be difficult to predict whether compensation is constitutionally required”). See also, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1183-1201 (1967) (“‘Taking’ is, of course, constitutional law’s expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation.”).

<sup>24</sup> Cf. Gary Lawson & Guy Siedman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1097 (1999) (“[T]he rule allowing the government to seize certain personal services [for military service, road repairs, and in-court testimony] without compensation, if correct, is a historically justified exception from the normal conceptual reach of the Constitution’s just compensation requirement.”).

<sup>25</sup> Jurors and military draftees customarily receive some nominal payment, but it is not even close to fully compensatory damages. See Kontorovich, *Liability Rules*, *supra* note 5, at 824.

costs are high. Thus, the lack of liability rule protection in these situations can best be explained by the difficulty of valuing liberty.<sup>26</sup>

1) *Ex ante transaction costs usually low.*

Individuals' liberty entitlements are generally protected by property rules because in most situations in which the government seeks to condemn liberty entitlements, transaction costs do not pose insurmountable problems. Consider, for example, criminal prosecutions. The government deals with large numbers of separate defendants, and need not succeed in striking plea deals or securing convictions against all of them.<sup>27</sup> This is because the individual entitlement holders are fungible. Unless the government has an unrealistic goal of a 100% conviction or plea bargain rate, it would do well enough by successfully negotiating the transfer of *some* the individuals' entitlements. Assuming that the harm caused by those charged with a given crime is more or less the same across a large number of cases, it does not much matter which defendants the government succeeds in making a deal with. If one accused murderer does not enter a plea bargain, another one might. This undermines the ability of both of them to extract surplus, thus preventing the holdout problems that can make property rules troublesome.<sup>28</sup> In other words, the entitlements are not in effect held jointly. A refusal to deal by one entitlement-holder cannot frustrate the entire scheme – unlike in many eminent domain situations.

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<sup>26</sup> The *habeas corpus* remedy does not create a property rule for liberty entitlements. The writ is only available to those already in custody. See 28 U.S.C. § 2255 (2003). Thus it does not in itself prophylactically prevent forcible takings of liberty, as would an injunction. Nor is habeas a liability rule, as a successful petition results in release but not money damages for the illegal detention already suffered. Thus perhaps habeas can be seen as creating a partial property rule: it provides property rule protection against particularly long takings of liberty.

<sup>27</sup> See Merrill, *supra* note 2, at 1158-59 (explaining that plea bargaining can be seen as “taking place in a relatively low transaction cost setting” because there are only two parties to the negotiation, both parties have information through counsel and “a viable alternative” to making a deal).

<sup>28</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 787-89.

Moreover, imperfect information and a lack of time will not systematically prevent successful prosecution or plea bargaining, as extensions are routinely given under the Speedy Trial Act to allow the government to develop its case.<sup>29</sup>

Yet in some situations involving liberty entitlements – such as such as quarantines and compulsory vaccination, military conscription, and mass detentions during national security emergencies -- the *ex ante* transaction costs are high enough to make property rules dysfunctional. Constitutional law authorizes the abandonment of property rule protection in such situations.<sup>30</sup> This Part will use compulsory jury service to illustrate the potential existence of prohibitive transaction costs in a context where uncompensated forcible takings of liberty are permitted as a matter of course.

## 2) Jury service: an example of high *ex ante* transaction costs?

Jury service is an almost entirely uncompensated taking of liberty. Why abandon property rule protection here? Certainly the government could get all the jurors it needs through conventional labor markets, just as the government gets all the clerks, janitors, and executives it needs, and just as film companies manage to get short-term work from extras. In classical Athens, payment was provided for jury service, set at roughly the cost of day's barley ration for an average family.<sup>31</sup> As a result, no compulsion was required to fill several-hundred member juries; indeed, prospective jurors lined up each morning for

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<sup>29</sup> See J. Andrew Read, *Open-Ended Continuances: An End Run Around the Speedy Trial Act*, 5 GEO. MASON L. REV. 733, 736-37 (1997).

<sup>30</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 780. Compensation is paid to conscripts, and in rare cases to those subject to compulsory vaccination and to national security detainees (as in the case of the Japanese interments). However, such payment is not considered to be constitutionally required, and does not even attempt to approximate “just compensation.” *Id.* at 824.

<sup>31</sup> See JOSIAH OBER, *MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE* 143 (1989) (discussing purchasing power of the three-obol wage for jury service).

the chance to serve.<sup>32</sup> If today a court advertised “jurors wanted, will pay \$12/hr.”, there would be no shortage of job-seekers at the courthouse door.

The problem might be one of adverse selection. A market system would result in juries composed largely of unskilled or not-very-skilled people -- those who sell their time at the lowest prices. This might not result in the kind of jury society wants.

Furthermore, one can imagine mitigating the problem by offering a schedule of wages: for example, \$12 an hour for high school graduates and \$30 for college graduates. This would create a more mixed jury. However, even with differential payment, voluntary jurors would be quite different from the rest of society in at least one potentially important way: they would be those people who particularly enjoy being jurors. Those who derive non-pecuniary utility from jury service would be more willing to accept jury service at a given price than those who enjoy it less. The jury system may be wary of people who like being jurors more than the average person does. If good jurors are those who, like Socrates’ ideal guardians of a city, will only exercise power if forced to by law,<sup>33</sup> then compulsory service *is* a necessary response to bargaining problems. Under a property rule, those who like being jurors would serve repeatedly. Such a professionalization of jury service was one of the chief complaints against the voluntary jury system in classical Athens.<sup>34</sup> Of course, it is far from obvious that the compulsory jury service principle is based on such concerns. For one, peremptory challenges allow

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<sup>32</sup> See *id.* at 142; ARISTOPHANES, *THE WASPS* (describing prospective jurors lining up to be chosen).

<sup>33</sup> See PLATO, *THE REPUBLIC OF PLATO*, Allan Bloom, trans. (2d ed. 1991).

<sup>34</sup> Aristophanes’ satire *The Wasps* portrays juries as being composed of citizens who particularly enjoyed passing judgment on others, primarily bitter old men who do nothing but serve on juries. See ARISTOPHANES, *supra* note 32. See also, OBER, *supra* note 31, at 143-44 (describing social composition of Athenian jury and suggesting that Aristophanes somewhat overrepresented the predominance of the old). Cf. DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* 129-31 (2000) (describing traditional view that *The Wasps* is a criticism of the kind of juries that serve for pay, and suggesting this was only incidental to Aristophanes’ concerns about the jury).

lawyers to create juries that do not particularly reflect society. Moreover, those who suffer particular disutility from jury service are given numerous ways out. Yet under the assumptions just described, these would be the people that society would want as jurors.

The compulsory jury service example highlights an important point about transaction cost analysis of constitutional rules. Property rules work poorly when bargaining is costly *relative* to the benefits of reaching a deal. In non-market situations like jury service, it is not obvious how to define the social benefit. Whether *ex ante* transaction costs would hobble the jury system depends on the purpose of the jury system itself. If the benefit of using a jury arises from it being composed of a diverse group of amateurs, then compulsion is necessary.

### 3) Ex post *transaction costs* always high.

Even among constitutional entitlements, those involving liberty interests are particularly difficult for courts to value. Liability rules for such entitlements will be justified only in unusual circumstances. Individual liberty is not traded in markets; indeed, such commerce is illegal. As a result, courts cannot look to market prices to establish damages. Moreover, deprivations of liberty will often entail significant emotional costs. While the tort system sometimes provides redress for psychic injuries, there is little confidence that such awards are well-proportioned to the injury. Furthermore, the proof of such injuries is expensive, involving testimony from the injured party, friends and relatives, and experts. Finally, legislated schedules of damages would fail to achieve accurate compensation. The extent of the injury caused by a deprivation of liberty for a given period varies greatly from person to person, depending on their

opportunity costs of time, their subjective attitudes toward confinement, and the conditions in which they are confined.

To be sure, some component of the injury, such as lost wages, can be accurately valued. Similarly, for unlawful seizure of property, some component can be accurately valued, such as the rental value of the property. The difference is that with liberty interests, the portion of the injury susceptible to objective valuation is a relatively small proportion of the total loss. Thus constitutional law's reluctance to afford anything other than property rule protection to the liberty entitlement is not a consequence of liberty being more sacred or important than property.<sup>35</sup> Rather, it is a consequence of liberty being harder to value in *ex post* judicial proceedings.

As an aside, it is instructive to consider how liberty interests are protected by the European Union. The European Convention on Human Rights requires that states provide monetary compensation to those deprived of their liberty in contravention of the Convention; it does not provide for injunctive relief.<sup>36</sup> The European Court of Human Rights has held that member nations must pay compensation for *any* encroachments on the Convention's liberty entitlement.<sup>37</sup> The compensation requirement, combined with

<sup>35</sup> Cf. Robert Brauneis, *Treanor's Mahon*, 86 GEO. L.J. 907, 927 n.116 (1998) ("We do not usually think of liberty as a commodity subject to eminent domain.").

<sup>36</sup> See Art. V., par. 5. ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."). Article V provides that an individual cannot be "deprived of his liberty" except when detained on the basis of "reasonable suspicion of having committed an offence," Art. V., par. 1(c), or after conviction for a crime." Art. V. par. 1(a). The Convention also described several other miscellaneous circumstances that make detention permissible, such as immigration cases, quarantines, and the confinement of the intoxicated or mentally ill. *Id.* par.1(e)-(f).

<sup>37</sup> See, e.g., *Yankow v. Bulgaria*, Application no. 39084/97, par. 195-198 (First Sec. Dec. 11, 2003); *Brogan v. United Kingdom*, (A/145-B), 11 EHRR 117, 137-38, pars. 66-67 (1989):

The government argued . . . that "lawful" for the purposes of the various paragraphs of Article 5 is to be construed as essentially referring back to domestic law and in addition as excluding any element of arbitrariness. It concluded that even in the event of a violation being found of any of the first four paragraphs, there has been no violation of paragraph (5) because the applicants' deprivation of liberty was lawful under Northern Ireland law and was not arbitrary. . . . The Court,



the Court's strict exhaustion-of-domestic-remedies rules, means the Convention protects liberty entitlement with a liability rule. The Court does not enjoin unlawful detentions, but rather orders *ex post* compensation. However, the Court frequently suspends the compensation requirement, holding that the symbolic value of declaring that rights have been violated itself compensates for most of the injury.<sup>38</sup> The use of such declaratory decisions in lieu of compensation is at least partially due to the difficulty of valuing the entitlement (it may also manifest an institutional concern that the Court's authority would be undermined if a sovereign state refused to pay a judgment for money damages).

#### 4) *The limits of liability rules for liberty entitlements.*

The great difficulty of valuing liberty suggests that a transaction cost approach to constitutional remedies should carefully distinguish it from other entitlements, particularly when a constitutional provision protects liberty alongside more readily monetizable interests (for example, the Fourth Amendment and the Due Process Clause). The same *ex ante* transaction costs that recommend liability rules for other entitlements

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like the Commission, considers that such a restrictive interpretation is incompatible with the terms of paragraph 5 which refers to arrest or detention "in contravention of the provisions of this article."

Indeed, the Court has ruled that even when the government has reasonable grounds to believe that particular individuals are involved in terrorist activities, it must pay compensation if it administratively detains them for at least four days without allowing any judicial review of the detention during that initial period. *See* Brogan, par. 62 ("The Court thus has to conclude that none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest [as required by Article 5(3)]. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).").

<sup>38</sup> *See, e.g.,* O'Hara v. United Kingdom, 34 Eur. Ct. H.R. 32, ¶¶ 55, 59 (2002) ("The Court has . . . found a breach of Article 5(3) in that the applicant was detained for more than the acceptable period before being either released or brought before a court, and a breach of Article 5(5) in that he enjoyed no enforceable right to compensation in that respect. Nevertheless, the Court finds, in the circumstances of this case, that . . . these findings of a violation constitute in themselves sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.").

might not do so for liberty.<sup>39</sup> However, the difficulty of *ex post* valuation does not obviate the need for scrutiny of *ex ante* transaction costs even when liberty entitlements are implicated. In some situations, like quarantines and compulsory vaccination, the transaction cost rationale is quite robust,<sup>40</sup> and in some, like the wartime draft, it is plausible but perhaps not compelling.<sup>41</sup> Others, like the peacetime draft, are in no way responses to bargaining problems, and thus appear suspect at least on economic grounds.<sup>42</sup> With takings of liberty for jury service, a search for *ex ante* transaction costs focuses attention on the purposes of the jury system.<sup>43</sup>

#### **D. Balancing constitutional transaction costs.**

Because both *ex ante* and *ex post* transaction costs are matters of degree, there will be situations where even high *ex ante* costs do not warrant an adoption of liability rules because *ex post* costs will be higher. This also suggests, perhaps counter-intuitively, that there may be cases with low *ex ante* transaction costs where liability rules would still perform at least as well as property rules, because *ex post* transaction costs would be even lower. An algebraic illustration will expand on these points.

$T_1$  will represent what are commonly called transaction costs, and what this Part has described with greater specificity as “*ex ante* transaction costs,” or the costs of transferring rights voluntarily.  $T_2$  represents *ex post* transaction costs, or the cost of using

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<sup>39</sup> The distinction between liberty and other entitlements will reoccur throughout the Article. *See* Parts III.A.3, III.B.3, IV.C.3, *infra*.

<sup>40</sup> *See* Kontorovich, *Liability Rules*, *supra* note 5, at 825-26.

<sup>41</sup> *See id.* at 827-30.

<sup>42</sup> *See id.* at 831; William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue*, 20 HARV. J.L. & PUB. POL’Y 23, 28-49 (1996).

<sup>43</sup> *See* Part I.C.2, *supra*.

the judicial system to administer the transfer of entitlements, including error and administrative costs. Finally,  $S$  represents the total surplus from the transaction; it will always be positive in this discussion. That is, it is assumed that the proposed government action would be desirable in a zero transaction cost world. (If  $S < 0$ , the entitlement should be protected by inalienability rule, which would prohibit the government both from purchasing and from taking the entitlement.)

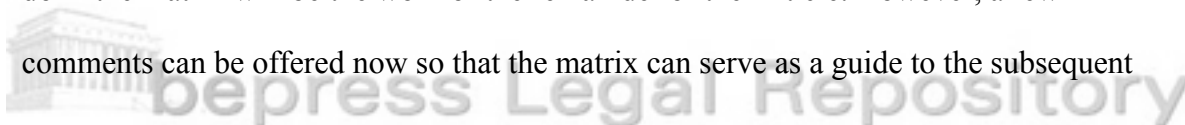
The choice between liability and property rules can be described through the interaction of these three terms,  $T_1$ ,  $T_2$ , and  $S$ . If the goal is maximizing social surplus, property rules should be used when the costs of privately transferring the entitlement are lower than the costs of a transfer mediated by the judicial system. Thus when  $S - T_1 > S - T_2$ , property rules should be used; when  $S - T_2 > S - T_1$ , liability rules should be used. When  $T_1 > S$  and  $T_2 > S$ , the proper response is an inalienability rule, that is, leaving the entitlement in its original position.

There is a wrinkle here that arises when  $T_2 < T_1 \leq S$ . Normally, the remedial rule should be chosen to maximize the net social benefit. With private entitlements, it is assumed that the parties will be able to make side payments when increasing the size of the surplus happens to reduce one party's share of it. Without such side-payments, parties would not agree to many efficient transactions, such as efficient contractual breaches. In the  $T_2 < T_1 \leq S$  situation, *ex ante* transaction costs would not interfere with socially beneficial activities, but it would still be cheaper to transfer entitlements through the judicial process than through private bargaining. Thus the net benefit principle suggests that liability rules should be used in these cases. However, if judicial valuation is the most efficient method of transferring rights, it is not clear why an entitlement-holder

would ever resort to an injunction even if a property rule applied. The rights holder would not block the taking with an injunction, as he would understand that if the judicial system is cheaper, the savings could be spread between the parties through side-payments.

However, when constitutional entitlements are involved, the government might be unable to make side-payments that would allow the individuals to share in the surplus. This raises problems when the liability rule leaves the individual worse off (because it is undercompensatory) but is still less socially costly than a property rule. Choosing the liability rule in this case might not make *both* parties better off than a property rule, and would thus fail the Pareto efficiency criterion. When side payments cannot be made, there will be little use for liability rules that are less than full compensatory if one thinks constitutional transactions must always satisfy the Pareto criterion, rather than simply maximize social surplus. The latter view may seem counterintuitive because constitutional entitlements are generally seen as individual rights. This suggests that only the individual's private benefit should be considered, and not the net benefit. Yet constitutional law routinely delimits the substantive scope of individual rights by weighing their value to the individual against the cost of their exercise to society. That is the essence of the ubiquitous "balancing" tests relied on by the Supreme Court. The formulae above merely suggest a similar inquiry for the selection of remedies.

The matrix below illustrates how four different combinations of *ex post* and *ex ante* transaction costs can lead to different types of protection for constitutional entitlements. Explaining the precise reasons that particular entitlements fall in where they do in the matrix will be the work of the remainder of the Article. However, a few comments can be offered now so that the matrix can serve as a guide to the subsequent



discussion. The cost of transferring entitlements through the judicial system, such as error costs arising from valuation difficulties, is represented horizontally. These are the costs associated with liability rules. The cost attendant to transferring an entitlement through voluntary bargaining, as required under a property rule, is represented vertically. For purposes of illustration, the costs are divided simply into “high” and “low,” although in reality the costs on both side are continuous variables. In each square are constitutional entitlements that involve that particular rough combination of transaction costs. The italicized ones are protected by property rules, the others by liability rules.

EX ANTE TRANSACTION COSTS			
EX POST TRANSACTION COSTS		High	Low
	High	Quarantines; Prior restraint (1)	<i>Default property rule: most of constitutional law</i> (2)
	Low	Eminent domain; Wartime quartering (3)	Use immunity for compelled testimony <i>Default property rule: most of constitutional law</i> (4)

Square 2 is the obvious place to start. Most constitutional entitlements fall within square 2. Here, there are few barriers to bargaining between the government and the entitlement-holder, and the costs of judicial valuation are high due to the non-market nature of constitutional entitlements. For example, the government faces relatively low *ex ante* transaction costs in negotiating plea bargains, while judicial valuation of the liberty

entitlement would be highly inaccurate. Thus the liberty of criminal defendants receives property rule protection.<sup>44</sup>

Square 4 shows that even when *ex ante* transaction costs are not extraordinarily high, there may be situations where courts can value the entitlement precisely. In such situations, it is conceivable that the judicial process would be the most efficient mechanism for transferring entitlements, and thus allowing a forced taking may be more efficient. For example, the Fifth Amendment's privilege against self-incrimination<sup>45</sup> is protected by a liability rule with the grant of immunity, not money damages, as a fixed price for compelling grand jury testimony.<sup>46</sup> Immunity gives full compensation to the protected right, which is why coerced testimony is permitted despite the Fifth Amendment. However, such situations will be quite rare. Thus property rules occupy most of square Four. Square 3 describes situations where *ex ante* transaction costs are particularly high, yet judicial valuation will be quite reliable. Eminent domain is the classic example; the ingredients are holdout problems on the *ex ante* side, and relatively easy *ex post* valuation because the real property has a market price.<sup>47</sup>

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<sup>44</sup> See Parts I.C.1, I.C.3, *supra*.

<sup>45</sup> U.S. CONST., amend V ("No person . . . shall be compelled in any criminal case to be a witness against himself.")

<sup>46</sup>

In effect, the ability of the government to demand self-incriminating statements in legislative hearings and the like after offering the proper immunity means that -- like its Fifth Amendment companion, the Takings Clause -- the Self-Incrimination Clause in some ways states a liability rule, not a property rule. Once we see this, we should see the centrality of the scope of immunity: it establishes the all-important fixed price at which the government may buy a person's testimony outside his own criminal case.

Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 875 n.64 (1995) (citing Calabresi & Melamed, *The Cathedral*, *supra* note 1).

<sup>47</sup> See Part II.A.2, *infra*.

Finally, square 1 shows a difficult situation: *ex ante* transaction costs are prohibitively high, but the entitlement is very difficult for courts to monetize. In such cases, liability rules may still be used because the monetization difficulties may be smaller than the social benefit to be had from the rights-taking. One expects to see liability rules used in square 1 only when the *ex ante* transaction costs are extraordinarily high, or when society is threatened with a large, sudden injury (thus *S* is high).

## II. THE THIRD AMENDMENT AND THE TAKINGS CLAUSE

The text of the Constitution says little about how the remedies for the substantive entitlements it defines. There is one well-known exception to this silence, where the Constitution explicitly mandates a particular remedy. The Just Compensation Clause<sup>48</sup> stipulates liability rule protection for the entitlement to not have one's property taken for public use.<sup>49</sup> Some scholars have argued that since only one constitutional provision specifies a remedial rule, it implies that the possible remedies for all other entitlements

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<sup>48</sup> See U.S. CONST., amend. V.

<sup>49</sup> Numerous scholars have observed that the Takings Clause involves a liability rule. See, e.g., Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 15 n.14 (2003) (observing that the "Takings Clause acts as a 'liability rule,' as opposed to a 'property rule.'"); James E. Holloway & Donald C. Guy, *The Utility and Validity Of TDRs Under The Takings Clause and the Role Of TDRs in the Takings Equation Under Legal Theory*, 11 PENN ST. ENVTL. L. REV. 45, 85-95 (2002); Ayres & Talley, *Solomonic Bargaining*, *supra* note 8, at 1037; Amar & Lettow, *supra* note 46, at 875 n.64; Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 131 n.36 (1992) ("The crucial point about the takings clause is that it creates only a 'liability' rule . . . the issue is whether the government must compensate, not whether it can act."). One court has described the Takings Clause in liability rule terms:

There is a fundamental conceptual difference between a takings claim and a substantive due process claim. If the government pays just compensation, it may take property for public use under the Takings Clause. Due process protections, by contrast, define what the government may not require of a private party at all. It is the difference between a liability rule and a property rule.

*Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3rd Cir. 1999) (Becker, C.J.).

are left open to legislative and judicial experimentation.<sup>50</sup> Yet because the one specified remedial rule is a liability rule, it also supports the opposite inference -- that property rules are implicitly required for all individual entitlements, except when, as with the Takings Clause, the Constitution expressly says otherwise.<sup>51</sup> Commentators have failed to notice that there is *another* constitutional provision that explicitly chooses between liability and property rule protection for individual rights:<sup>52</sup> the ban on quartering troops in peacetime found in the much-neglected Third Amendment.<sup>53</sup> Unlike the Takings Clause, the Third Amendment mandates *property rule* protection.

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<sup>50</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 815-17 (arguing that Constitutional text leaves remedies for violations of rights open except for instances, like the Takings Clause, that specifically provide an exclusive form of protection for a particular right); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366-70 (1953) (arguing that Congress's control of organization and jurisdiction of the courts allows it to remove certain remedies for constitutional violations, including injunctive relief, so long as it keeps *some* remedy available).

<sup>51</sup> See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 76-77 (1996) (arguing that because liability rule only specified for takings of material property under Fifth Amendment, it implies that liability rules do not apply to the "information property" entitlement created by the First Amendment).

<sup>52</sup> Cf. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 796 (5<sup>th</sup> ed. 2003) (citations omitted):

The text only refers explicitly to remedies in two instances. First, the remedy of habeas corpus is safeguarded against "suspension" by Congress. Second, the Just Compensation Clause dictates the remedy for interference with property rights amounting to a taking – compensation for the impairment of value.

While the Just Compensation Clause creates a liability rule, the Suspension Clause should not be seen as ensuring a property rule. See U.S. CONST., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Habeas is itself a remedy, so the Constitution's insistence on its availability simply ensures that whatever protection habeas provides shall not be eliminated except in narrow circumstances. The Safeguarding Clause is not a remedy at all, so it is neither a property nor a liability rule. As to the habeas remedy itself, it is something in between a liability and property rule. See note 26, *supra*.

<sup>53</sup> U.S. CONST., amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war but in a manner to be prescribed by law."). Very few cases raise Third Amendment claims for the obvious reason that quartering is no longer a particularly desirable means for the military to house troops. Even academics have paid little attention to this "lost" amendment. See *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1042 (10<sup>th</sup> Cir. 2001) ("Judicial interpretation of the Third Amendment is nearly nonexistent."). For one of the only modern cases entertaining a Third Amendment claim, see *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (holding that Third Amendment claim by corrections officials whose government-owned housing units at prison were occupied



Looking at the Third Amendment in two dimensions gives a new perspective on several important constitutional questions. First, it reveals the close relationship between the Third Amendment and the Takings Clause.<sup>54</sup> Second, it offers an important new perspective on the contentious question of whether regulatory or partial takings are compensable. Finally, when taken together, the Third Amendment and the Takings Clause provide strong support for the view that all other constitutional provisions remain indifferent between liability and property rules. In short, the previously unnoticed property rule in the Third Amendment reinforces the argument that there is no general implication of property rule protection for constitutional entitlements.

#### **A. Liability and property rules in the Takings Clause.**

##### *1) Forms of protection.*

The Takings Clause contains a liability rule, but also a property rule. The Just Compensation Clause announces liability as the exclusive form of protection for takings of property for public use, such as eminent domain. The government cannot be enjoined from seizing property under the clause, but it can be ordered to pay judicially-determined “just compensation” after the fact. This is the only individual entitlement in the

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by National Guardsmen called in during strike by corrections officers survives summary judgment, but noting “the absence of any case law directly construing this provision”).

<sup>54</sup> Only a few lawyers have noted the similarities between the Third Amendment and the Takings Clause. The only extended discussion can be found in Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 146-47 (1993) (discussing quartering in wartime as a type of taking for which “just compensation” would be required.). See also, *Johnson v. United States*, 208 F.R.D. 148, 152 (W.D. Tex. 2001) (describing Third Amendment “as first cousin to the Fifth”); Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The “Living Constitution,” the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 785 (2000) (“Just as that constitutional provision limits the government’s ability to take private property without compensation, so the Third Amendment layers an additional restriction upon the specific takings of land that fall within its purview.”).

Constitution that can *never* be protected with equitable remedies.<sup>55</sup> By negative implication, when a taking is not for a “public use,” the owner can enjoin it – he enjoys property rule protection.<sup>56</sup> Thus the robustness of the public use doctrine determines how much of the Fifth Amendment entitlement falls under a liability rule and how much under a property rule. Looser definitions of “public use” of the kind the Supreme Court has favored in recent decades<sup>57</sup> increase the scope of the liability rule; narrower ones increase the scope of the property rule.<sup>58</sup>

<sup>55</sup> See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.”); *Garvey*, 256 F.3d at 1042 (“Injunctive relief is not available under the Fifth Amendment absent an allegation the purported taking is unauthorized by law.”).

<sup>56</sup> See Richard A. Epstein, *A Clearer View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2112 (1997) [hereinafter, Epstein, *A Clearer View*]; Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21, 34 (1997). The Takings Clause toggles between a property and liability rules depending on the existence of a given circumstance, namely, a public use. Thus the Takings Clause is the paradigmatic of what Profs. Bell and Parchomovsky have dubbed a “pliability rule” – one that combines elements of both property and liability rule protection. See Bell & Parchomovsky, *supra* note 9, at 59-60 (“Arguably the most famous instance of pliability rule protection is provided by the law of eminent domain.”). See also, Kontorovich, *Liability Rules*, *supra* note 5, at 768-70 (explaining “pliability rules”);

<sup>57</sup> See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240-41 (1984) (“[W]here the exercise of the eminent domain power is rationally *related to a conceivable public purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”) (emphasis added). In *Midkiff*, the Court unanimously upheld the use of the takings power to transfer land from one group of private landowners to another, with the asserted “public use” being the breaking-up of large concentrated land holdings. See *id.* at 241-42; see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161 (1985) (observing that the Court has delivered a “mortal blow” to the public use limitation by making it broad enough “to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress”). However, some state courts have refused to treat the public use limitation as a dead letter. See Kontorovich, *Liability Rules*, *supra* note 5, at 777 n.65 (citing cases). Most notably, the Michigan Supreme Court recently overruled its notorious *Poletown* case, and held that turning land over to private developers does not constitute a public use. See *City of Wayne v. Hathcock*, 2004 WL 1724875 (Mich. July 30, 2004). State courts have also adopted narrower interpretations of the public use limitations in their state constitutions. See, e.g., *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (“[W]e hold that when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is ‘really public.’”).

<sup>58</sup> See Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 89-90 (1998) (“When the Public Use Clause is weak, the Takings Clause acts primarily as a liability rule, allowing the condemnation of land whenever compensation (the liability for damages) is paid. Consequently, strengthening the public use requirement works to move the

## 2) *Transaction cost justification.*

The Just Compensation Clause's liability rule is a response to the high transaction costs associated with eminent domain. The nature of these costs has been exhaustively explored in previous scholarship and need only be sketched here.<sup>59</sup> The problem arises when the government wishes to build a facility (such as an airport, road, military base, or dam) that requires the purchase of numerous parcels of land. Each parcel will likely be owned by a different individual. Under a property rule, the government would need to strike a deal with every landowner. If even one landowner refuses to sell, the entire project would be undone – one cannot have an airport runway with someone's house in the middle of it. The problem becomes more acute if the project can only be built in a particular place due to natural geographic constraints (as with a dam) or to due to previous development (as with road and airport expansions).<sup>60</sup> In short, it is the lack of close substitutes for the desired property that allows for hold-up.

Each individual landowner can exert veto power over the entire project, although he only controls a small portion of the total area to be developed. Thus *each* landowner might hold out for a large share of the surplus. When each property owner seeks to appropriate a disproportionate share of the surplus not all can be paid off and the project

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Takings Clause toward the categorization of a property rule, prohibiting certain acquisitions of land without the consent of the owner regardless of whether compensation is paid.”); Epstein, *A Clearer View*, *supra* note 56, at 2113 (“The only sensible interpretation of the Public Use Clause is that it indicates that the state cannot always operate under a regime of take and pay, that is, with the benefit of an unconstrained liability rule. As an initial proposition, where the taking is not for a public use . . . then the individual property owner is once again protected by a property right, so that what can be taken can only be taken with consent.”).

<sup>59</sup> See, e.g. ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 289-90 (2000); Merrill, *supra* note 2, at 1159-60; Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1106-07. See also, Kontorovich, *Liability Rules*, *supra* note 5, at 765-66.

<sup>60</sup> Cf. Merrill, *supra* note 2, at 1159 (“[I]f the government's needs are site-dependent . . . then it is likely that one or more landowners will bargain strategically. This will substantially increase the transaction costs of acquiring the desired land.”).

will fall through. Only by switching to a liability rule can the government break through the holdout problem. When the government can take first and then pay later, the original owners cannot hold the project hostage and seek to expropriate the surplus. Instead, each must content themselves with “just compensation.”

Thus the Takings Clause’s liability rule is a necessary response to a particularly severe holdout problem – but it is also an overbroad response that exceeds the transaction cost rationale. The liability rule is limited only by the “public use” requirement. Yet not all takings for public use face similar holdout problems. If the state needs to buy 100 office chairs, it can purchase them in a competitive market of chair-makers. The assets are not unique: chairs of different manufacturers are close substitutes for one another. And the manufacturers do not possess veto power because the refusal to sell the 100<sup>th</sup> chair would not nullify the benefits of purchasing the first ninety-nine. Moreover, when real property is not involved, there are far fewer barriers to entry by other entitlement holders who would be willing to sell. Thus if the government used the Takings Clause to seize automobiles, or an automobile plant, it may well be for a public use, but not one for which a liability rule is appropriate.<sup>61</sup> Assuming that the government internalizes the cost of its actions, this may not be much of a problem. When markets function well (that is, transaction costs are low), the government may well face higher *ex post* transaction costs in a reverse condemnation suit than in voluntary bargaining. Thus in low-transaction cost settings it may actually “prefer[] to negotiate a transfer of the asset under ordinary

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<sup>61</sup> See COOTER, *supra* note 59, at 289-90 (“[T]he state should not *take* property with compensation *merely* to produce public goods. In most cases, the state should *buy* property to produce public goods.”); Merrill, *supra* note 2, at 1159 (“If the government can accomplish its objectives by dealing with a competitive market of rightsholders, then it is unlikely that transaction costs will stand in the way of exchange.”).

property rule protection” rather than resort to the Takings Clause liability rule.<sup>62</sup> This is consistent with how the government actually behaves: pencils, cars, cement and so forth are purchased rather than condemned under the Takings Clause.<sup>63</sup>

## **B. Property and liability rules in the Third Amendment.**

### *1) Forms of protection.*

Like the Takings Clause, the Third Amendment contains both a liability rule and a property rule (and is thus also a “pliability rule”<sup>64</sup>). The peacetime quartering clause states a property rule; the wartime quartering clause announces a liability rule. In peacetime, quartering of troops can only be done with “the *consent* of the Owner.”<sup>65</sup> The requirement that the original entitlement holder’s consent be secured *ex ante* is the defining characteristic of a property rule.<sup>66</sup> Thus the government must negotiate with the owners of the properties where it wishes to quarter troops. The price the owners demand, if they agree at all, will reflect the full cost of the imposition. If the government tries to quarter troops without having consent, the owner could receive equitable relief. Punitive and compensatory damages would be awarded when it is too late for an injunction.<sup>67</sup>

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<sup>62</sup> See Bell & Parchomovsky, *supra* note 9, at 63.

<sup>63</sup> See COOTER, *supra* note 59, at 289.

<sup>64</sup> See note 56, *supra*.

<sup>65</sup> U.S. CONST., amend. III (emphasis added).

<sup>66</sup> See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 380 n.91 (“‘Property rules’ . . . require the consent of the entitlement holder before the entitlement can be taken.”); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 19 n.36 (1988) (“‘Property protection’ means that control over the asset can only be lost by consent.”).

<sup>67</sup> See Bell, *supra* note 54, at 146 & n.228 (“Unless they levy punitive damages or other penalties against those responsible for this illegal and unconstitutional behavior, the Third Amendment’s consent requirement will offer no more protection from quartering than the Fifth Amendment’s takings clause.”).

In wartime, however, the Third Amendment no longer requires the owner's consent, and thus abandons property rule protection. Instead, the military can compel home owners to lodge troops, at least when authorized to do so by Congress. In wartime the government need not bargain with the homeowners when it wishes to quarter troops. The Amendment does not explicitly address whether the property rule is replaced with a liability rule, and thus owners receive compensation for wartime quartering. As a textual matter, it is not entirely clear whether the "law" prescribing quartering must satisfy the Just Compensation Clause, or whether the separate treatment of wartime quartering in the Third Amendment means it is a "special class of takings" not requiring compensation.<sup>68</sup> Tom Bell, apparently the only scholar to consider this question, reasonably concludes that the Takings Clause applies to wartime quartering, and so compensation is required.<sup>69</sup> Thus the Wartime Quartering clause, like the Just Compensation Clause, creates a liability rule.<sup>70</sup>

## 2) *Transaction cost justification.*

The divisions between the Fifth Amendment's liability rule, the Third Amendment's property rule, and the Third Amendment's liability rule are consistent with, and perhaps motivated by, differences in the underlying transaction costs. The Takings Clause announces a liability rule because in many situations where the government seeks to take land for public use -- such as to build a road, fort or airfield --

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<sup>68</sup> *Id.* at 147-48.

<sup>69</sup> *Id.* ("Applying the Ninth Amendment and the Fifth Amendment to the case at hand leads quite directly to one conclusion: the Third Amendment's enumeration of a constitutional right to legal constraints on wartime quartering shall not be taken to deny or disparage a homeowner's right to receive just compensation for a public taking.").

<sup>70</sup> Bell notes that the liability rule for wartime quartering would not be fully compensatory. *Id.* at 149 ("It . . . does not appear that the victims of quartering could recover for what may be their most grievous injuries: being forced onto the street, seeing strangers occupy and ransack their houses, and homesickness.").

holdout problems could scuttle the project if the entitlements are protected by property rules. The Peacetime Quartering Clause carves out a property rule exception to the broad liability rule in a discrete class of takings that do not face prohibitive transaction costs.

In peacetime, the military can use the rental market to house soldiers. If this is inadequate, it can construct barracks for them, which in peacetime is a perfect substitute for quartering in private homes. The private rental and construction markets are competitive; one potential seller can easily be substituted for another. Moreover, geographic considerations will not limit the government to a few specific sites for quartering troops, as they may for building roads and airports. Indeed, the Third Amendment contemplates the use of private homes, suggesting a situation in which a dispersion of troops is acceptable. Thus the military will not face the kind of hold-out problems that plague eminent domain. Assuming that the government internalizes costs, the Third Amendment ensures that troops will be housed in the most cost-effective manner. Troops will not be quartered in the homes of those who would be greatly inconvenienced or intimidated, as such people would not give their consent, or charge more than others would. In short, because transaction costs are low, the Third Amendment uses a property rule to prevent the government from bypassing well-functioning markets and to ensure that the government takes into account idiosyncratic valuations of property.

In wartime, transaction costs suddenly become much higher. The number of soldiers needing accommodation rapidly increases, and this change may be greater than the rental and construction markets anticipated. Markets will not clear quickly enough because it may take time for new sellers to enter the market in response to the heightened

demand. The shortness of time is itself a source of transaction costs. Delay, particularly in wartime, may carry very high costs, including defeat.<sup>71</sup> Moreover, in wartime, it will be more important for troops to be quartered together and in a few specified places, such as near staging grounds, ports, or places in need of defense. This gives monopoly power to the homeowners situated near those areas, and resurrects the holdout problems characteristic of eminent domain. Not surprisingly, the remedial rule in this situation switches back to liability, the one used for eminent domain.

Interestingly, one of the rare modern cases raising Third Amendment claims shows sensitivity to the transaction cost justification of the peacetime property rule. The plaintiffs claimed that overflights of their land by the Air Force constituted a “quartering” that required the consent of the landowners.<sup>72</sup> The court said that the argument “borders on frivolous.”<sup>73</sup> If consent were required for overflights, thousands of property owners in the flight path would have veto power over Air Force training. The consent of *every* landowner in the flight path would need to be secured; if even one owner withheld consent, successful bargains with all the others would be for naught. Thus *each* owner could hold out for the *full* value of the flights – the classic case in which property rules are dysfunctional.<sup>74</sup> The court’s emphasis on the property owners’ holdout power

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<sup>71</sup> Similarly, the need to *quickly* fill the army’s ranks is the justification for the wartime draft, which allows the government to bypass labor markets. See Kontorovich, *Liability Rules*, *supra* note 5, 827-28. The draft, however, is not a true liability rule. Conscripts’ salaries are well below compensatory in wartime, and the Supreme Court has suggested that the Constitution does not require any payment at all. *Id.* at 824.

<sup>72</sup> Garvey, 256 F.3d at 1043.

<sup>73</sup> *Id.*

<sup>74</sup>

The property Petitioners seek to protect is the airspace above their land. Taken to its logical extreme, Petitioners would have the United States military seek consent from every individual or entity owning property over which military planes might fly, and then design its training exercises to utilize only that airspace for which permission was granted, or else risk Third



suggests that the Third Amendment's property rule protection might be abandoned even in peacetime in situations where, as in wartime, transaction costs would block activities with net social benefits.<sup>75</sup>

### C. The relationship between the Third and Fifth Amendment.

The Third Amendment and the Takings Clause are closely related provisions, and the former has much to say about the scope of the latter. While the Third Amendment is almost never mentioned in cases or scholarship, the Takings Clause is a subject of perpetual academic interest and litigation. A particularly contested question concerns regulatory or partial takings under the Fifth Amendment.<sup>76</sup> In brief, the regulatory takings question is whether government action that substantially reduces but does not eliminate the value or usability of a property constitutes a "taking" that requires compensation. Under the Supreme Court's takings jurisprudence, the only situations in which compensation is definitely required are when a regulation destroys the full value of ownership<sup>77</sup> or involves a permanent physical invasion of property.<sup>78</sup>

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Amendment liability. We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners' consent.

*Id.* (emphasis added).

<sup>75</sup> Though *Garvey* rested its decision on the disastrous consequences of enforcing a property rule for overflights, a simple textual argument would have sufficed. Overflights appear more analogous to an army marching across peoples' land, which is quite different from the army being quartered in their houses, and falls under the Takings Clause, if anything.

<sup>76</sup> The literature is too vast to even survey except to note the polar positions. Prof. Treanor argues that the original intent behind the clause was limited to actual physical confiscation of property. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985). On the other side of the debate, Prof. Epstein has famously argued that even partial takings must be fully compensated. See EPSTEIN, TAKINGS, *supra* note 57, at 57-58, 263-273.

<sup>77</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>78</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 422 (1982).

Yet the voluminous literature on regulatory takings has not noticed that the Constitution itself explicitly addresses the question.<sup>79</sup> The Third Amendment protects against quartering of troops, which is a specific type of partial taking. When troops are quartered in a private house, the owner's occupancy of the property is limited and its value reduced; yet the owner retains title, can derive some benefit from the property, and will presumably regain full possession after some time. In effect, the owner is forced to board tenants at rental rate he deems too low – zero dollars. The Supreme Court has described similar governmental action as a regulatory taking that does not require compensation.<sup>80</sup>

Thus the Constitution isolates and provides protection against one particular form of regulatory taking out of the countless forms they can take. This could suggest through negative inference (the canon of statutory construction known as *expressio unis est exclusio alterius*) that there is no entitlement against *other* types of partial takings, even those involving physical invasion. Put differently, if the Fifth Amendment protects against regulatory takings, then the Third Amendment appears to be unnecessary and redundant. A broad application of the negative inference would find that the Third

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<sup>79</sup> Professor Harrington has briefly adverted to the Third Amendment in a recent discussion of regulatory takings. He argues that the Just Compensation Clause and the Third Amendment are related in a different way from that suggested here: both were introduced into the Constitution as a means of safeguarding citizens against the impositions of a standing army. See Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2073-74 (2004):

[T]he traditional fear of large standing armies . . . gave rise to concerns about the power of the new national government to requisition supplies *without payment*. These fears no doubt led Madison to include provisions in his proposed amendments prohibiting the quartering of troops among the populace. The Compensation Clause added to these protections by preventing the government from taking property to support its troops without payment for goods or services received.

This interpretation illustrates the dangers of viewing entitlements in one dimension. See text accompanying note 82, *infra*.

<sup>80</sup> See *Block v. Hirsh*, 256 U.S. 135, 156-57 (1921) (Holmes, J.).

Amendment entirely settles the regulatory takings dispute against compensation. A more modest reading would find that the Third Amendment provides a benchmark for regulatory takings: to be compensable, they would have to involve a much more severe deprivation than the quartering of troops. Even this modest interpretation of the Third Amendment would be useful to regulatory takings jurisprudence, as the quartering benchmark may be easier to implement than Justice Holmes' notoriously slippery standard that regulation only becomes a compensable taking when it goes "too far."<sup>81</sup>

Yet on closer examination, the Third Amendment does not imply that other types of regulatory takings do not require constitutional scrutiny. To understand why, one must look at both the Takings Clause and the Peacetime Quartering Clause in two dimensions. Both deal with takings, the former with takings generally and the latter with a particular type. But there is a fundamental difference between the two, a difference found in the remedial rather than in the substantive dimension. The Just Compensation Clause creates an entitlement against takings but protects it with a liability rule. The Peacetime Quartering clause, by contrast mandates the more robust property rule protection. Thus the purpose of the Third Amendment is to ensure *greater* protection for the anti-quartering entitlement than for other property rights. The provision of a higher degree of protection against what was regarded as a particularly odious type of taking does not suggest that there is no *substantive* entitlement against regulatory takings. To the contrary, the Third Amendment's remedial approach is more consistent with the view that there is a substantive entitlement against all other regulatory takings for public use, but it is protected by a liability rule. This demonstrates the importance of viewing the

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<sup>81</sup> *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). *See also*, *Lucas*, 505 U.S. 1015 ("[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment.").

Constitution in two dimensions. For if one ignored the property rule aspect of the Third Amendment, it would lead one to the opposite conclusion -- that regulatory takings do not require compensation.<sup>82</sup>

#### **D. The Third Amendment and the permissibility of liability rules.**

The Third Amendment's explicit creation of a property rule has great significance for the theory of constitutional remedies. It is the *only* explicit property rule in the Constitution. Yet if, as is commonly assumed, *all* constitutional rights inherently carry with them property rule protection, there would be no need for the Third Amendment to specify property rule protection. If constitutional rights presumptively cannot be taken without consent, the Third Amendment could have simply said "No Soldier shall, in time of peace be quartered in any house." The property rule would be implied from the mandatory "*shall*." There is a strong presumption against interpreting the Constitution in a way that would render some of its language nugatory.<sup>83</sup> The phrase "without the consent of the Owner" would be pure surplusage if there is a background presumption of property rule protection.

Every individual entitlement could have been modified with a "consent" requirement to protect against its taking. For example, the Fourth Amendment could have provided that the right to be free of "unreasonable searches and seizures, shall not be

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<sup>82</sup> For example, Harrington's interpretation of the relation between the two provisions illustrates the dangers of looking at entitlements in only one dimension. *See* note 79, *supra*. He ignores the fundamental difference between the two entitlements: the government *can* take property without consent if it subsequently pays for it, but it cannot forcibly "take" the occupancy of a person's house even if it provides compensation. The different remedial treatment of different types of takings suggest that, contrary to Harrington's view, a different set of concerns motivated the two constitutional provisions.

<sup>83</sup> *See, e.g.* *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.).

violated *without the consent of the Owner*.” But no other entitlement was thus modified.<sup>84</sup>

The failure to stipulate consent as a necessary condition for transfers of other entitlements, given the explicit provision of this requirement in the Third Amendment, suggests that the Constitution does not *require* property rule protection.

This does not mean that all other entitlements must be protected by liability rules. The Just Compensation clause mandates a liability rule for the entitlement it protects. This too would be superfluous if liability was the default remedy for entitlements whose protective rule is not specified. The Third Amendment’s explicit property rule and the Just Compensation clause’s explicit liability show that the Constitution’s specification of entitlements does not in *itself* assign either form of protection to entitlements. These two explicit remedial provisions delimit the spectrum of constitutional remedies. The Constitution only specifies the *substance* of other entitlements. Its silence about how they should be protected is just that: silence.

Some have inferred from the Takings Clause that remedies for other rights are left to legislative and judicial discretion. But the Third Amendment cements the case: two points define a line. Here, the line is the continuum of remedies ranging from injunctive relief to money damages, which can be compensatory in various degrees. Both polar options – liability and property – are available, as are various “liability rule” mixtures of the two. While property rules will generally be the best mode of protection, this is only for functional reasons, and not because of a constitutional requirement.

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<sup>84</sup> The word “consent” appears in no other amendment, nor in the Art. I, § 9, cl.2-4, which also define individual liberties. The word is used in Art. I and elsewhere in relation to structural issues of federalism and separation of powers, most famously the requirement of senatorial “Advice and Consent.” Art. II., § 2, cl. 2. *See e.g.*, Art I, § 10, cl. 2 (“No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports and Exports”); Art. I, § 10, cl. 3 (providing *inter alia*, that “No State shall, without the Consent of Congress” engage in military activity or foreign relations).

### III. STRUCTURAL LIABILITY RULES

Perhaps the most widespread use of liability rules in constitutional law is also the most subtle. “Structural liability rules” do not explicitly call for liability protection, but create it in practice by making certain determinations about *when* the government can, without *ex ante* judicial process, act in a way that might destroy individual entitlements. When constitutional law authorizes the government to act first and then justify itself in a hearing afterwards, this in effect creates a liability rule in that the initial action cannot be enjoined even if it happens to destroy an individual entitlement.

#### A. Procedural Due Process

##### 1) *The sufficiency of post-deprivation process.*

The rules governing when a hearing is required under the Due Process Clauses sometimes create liability rules. One obstacle to thinking about liability rules as an option for constitutional entitlements is that substantive entitlements are often conflated with the potential remedies that protect them. The Due Process clause, however, specifically deals with the *procedures* for condemning or transferring the *substantive* entitlements of the Fifth and Fourteenth Amendments (life, liberty and property). So violations of procedural due process are distinct from the underlying violations of liberty or property interests.

Determining what “process” is “due” involves choosing between property rules and liability rules for the protection of the Fifth Amendment’s *substantive* rights. When, as is generally the case, the “process” must occur before the taking of the substantive entitlement, a property rule is created. When the process can be had after the taking, the process in effect becomes an *ex post* remedy and a liability rule is created. The polar

cases illustrate the point. At one extreme, the default due process requirement for the liberty and property entitlements prohibits their taking without the government first condemning them in a trial or similar administrative proceeding.<sup>85</sup> Thus the government must get *ex ante* permission -- either from the individual or a court -- to take the entitlement. This creates the basic property rule protection for liberty interests. At the other extreme, some substantive constitutional rights may be taken with no *ex ante* hearing whatsoever; the victim is confined to “post-deprivation” remedies.<sup>86</sup> These lower due process requirements create a liability rule since the entitlement can be coercively taken at a price established through the *ex post* process.

Between these polar cases are the majority of modern “procedural due process” cases involving administrative or “public rights.” In these cases, a property or liberty interest created by the government cannot be taken without an *ex ante* hearing of some kind. However, the hearing need not be a full-blown judicial procedure. Rather, it can be a down-and-dirty administrative procedure, with resort to judicial process available only after the consummation of the challenged action.<sup>87</sup> Simplified procedural requirements do

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<sup>85</sup> See *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). See also, Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUMB. L. REV. 309, 330 (1993) (“When some kinds of liberty and property interests are involved--the right to freedom from criminal incarceration, for example--the Due Process Clause requires a judicial hearing.”).

<sup>86</sup> See *Zinerman v. Burch*, 494 U.S. 113, 128 (1990) (“In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. . . . *Parratt* and *Hudson* represent a special case . . . in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.”); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (“[W]e hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.”).

<sup>87</sup> See Fallon, *supra* note 85, at 330-31 (“[W]hen an adequate substantive justification exists, government officials may lawfully deprive people of liberty and property in public rights cases and possibly in other circumstances too without first invoking judicial processes.”).

not allow for naked takings of entitlements, but they presumably increase the chances that the government can deprive individuals of their rights the high level of *ex ante* scrutiny of the transaction allowed by a property rule. Thus they leave the entitlement protected by something between a property and a liability rule.

The liability rule aspect of confining entitlement holders to post-deprivation remedies becomes evident when one considers the classic cases *Parratt v. Taylor*<sup>88</sup> and *Hudson v. Palmer*. These cases involved, respectively, a negligent and intentional (but not pursuant to policy) destruction of prisoners' property by prison officials. Since these takings of property were not for public use, they would typically be protected by a property rule: the destruction would require the *ex ante* consent of the prisoner himself, or of a judicial officer after an *ex ante* hearing. However, in these cases, the Court has held that a prisoner's *due process* right is not violated if his property is accidentally or even intentionally destroyed by a prison official, *provided that* post-deprivation remedies are available. In other words, the government can take the entitlement first and pay later.

2) *Transaction cost justification.*

High *ex ante* transaction costs provide the most obvious justification for these decisions and thus also suggest their natural limits. Just as allowing drivers to enjoin potentially negligent or even reckless motorists would paralyze the highway system, allowing prisoners to enjoin negligent prison officials whose actions might destroy their property would risk paralyzing the prison system.<sup>89</sup> And under certain assumptions about the difficulty of monitoring the unauthorized intentional acts of prison employees, the

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<sup>88</sup> 451 U.S. 527 (1981).

<sup>89</sup> *See id.*



same is true of intentional destruction of property.<sup>90</sup> Thus for procedural due process entitlements, *ex ante* procedures are not required when they would be extraordinarily burdensome in comparison to the benefits of the taking.<sup>91</sup> When *ex ante* processes are so costly that they would preclude activities with a net social benefit, the government can take first and pay money later.<sup>92</sup> Indeed, the factors specifically mentioned by the Court as militating for liability protection are transaction costs: the administrative expenses of allowing property protection and the need for quick action,<sup>93</sup> the latter a motif that recurs frequently when constitutional rights receive less than property rule protection.<sup>94</sup>

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<sup>90</sup> The Supreme Court made these assumptions in *Hudson*, 468 U.S. at 530-31.

<sup>91</sup> See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (“We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”); *Zinermon*, 494 U.S. at 132 (holding that purely “postdeprivation remedies might satisfy due process” when “a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake”). This formulation seems to ignore the social benefit of the government action. The *Matthews v. Eldridge* balancing test does take into account the social benefit from the taking of liberty, under the prong focused on “the government’s interest.” See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>92</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (“This Court has recognized, on many occasions, that where . . . it would be *impractical* to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.”) (emphasis added); *Parratt*, 451 U.S. 527; *Mathews*, 432 U.S. at 335 (holding that *ex ante* remedy not required when its marginal benefit over *ex post* remedy exceeds marginal cost).

<sup>93</sup> See *Gilbert*, 520 U.S. at 930 (noting that providing only postdeprivation process is appropriate “where a State must *act quickly*”) (emphasis added). Compare *James Daniel Good Real Property*, 510 U.S. at 56-58 (holding that *ex parte* civil forfeiture of home violates right to due process because as real property cannot abscond, the forfeiture was not “justified by a pressing need for prompt action”), with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974) (holding that “postponement of notice and hearing until after seizure did not deny due process” when “the property seized—as here, a yacht . . . could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.”).

<sup>94</sup> See text accompanying note 71, *supra* (discussing need for quick action as a transaction cost basis for liability rule for wartime quartering under Third Amendment).

### 3) *Liberty entitlements.*

*Zinermon v. Burch* refused to categorically exempt liberty entitlements from structural liability rule treatment.<sup>95</sup> The transaction cost considerations posed by property and liberty interests are different in degree, not in kind, and thus even the latter will sometimes be suitable for liability protection.<sup>96</sup> However, the Court appeared to incorrectly suggest that the difference between property and liberty interests is that the latter are generally worth more.<sup>97</sup> While this is true of the particular example offered by the Court, there is no reason to believe it will always be the case. A deprivation of all of one's property will be more injurious than a one-minute deprivation of liberty, and there is no reason to believe that unauthorized deprivations of liberty will be systematically more acute than similar deprivations of property.

In holding that purely postdeprivation remedies could be appropriate for liberty interests as well as property interests, the Court failed to advert to the greater difficulty of arriving at a fully compensatory liability for the former.<sup>98</sup> *Parratt* involved the loss of a mail-order hobby kit with a determinate monetary value.<sup>99</sup> The Court in that case observed that protecting the property interest with liability rules was unproblematic because the *ex post* “remedies could have fully compensated . . . for the property loss he

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<sup>95</sup> See *Zinermon*, 494 U.S. at 131-32 (“Burch argues that postdeprivation tort remedies are *never* constitutionally adequate for a deprivation of liberty, as opposed to property, so the *Parratt* rule cannot apply to this case. We, however, do not find support in precedent for a categorical distinction between a deprivation of liberty and one of property.”).

<sup>96</sup> Part I.C, *supra*, discusses the particular valuation problems raised by liberty entitlements.

<sup>97</sup> *Id.* at 132 (“It is also true that Burch’s interest in avoiding five months’ confinement is of an order different from inmate Parratt’s interest in mail-order materials valued at \$23.50.”).

<sup>98</sup> See 468 U.S. at 535.

<sup>99</sup> *Parratt*, 451 U.S. at 529 (noting that lost hobby kit was worth \$23.50).

suffered.”<sup>100</sup> Yet instead of explicitly considering these *ex post* transaction costs, *Zinerman* raised the *ex ante* transaction cost goal post. In cases involving property interests, the Court sometimes upholds purely postdeprivation process (a liability rule) even when predeprivation process is feasible but “impractical.”<sup>101</sup> Yet in *Zinerman*, the Court said predeprivation procedures could only be avoided if requiring them would be “impossible” or “absurd.”<sup>102</sup> In other words, the inquiry with property interests is whether *ex ante* transaction costs are likely to be higher than the social benefits from the transaction; with liberty, the question becomes whether property rules would *certainly* block the social benefit. The higher *ex ante* transaction cost threshold for liberty liability rules can be understood as a veiled response to the *ex post* valuation problem (though it is far from clear that this is what the Court had in mind). Because *ex post* transaction costs are particularly high, *ex ante* costs must be higher than the level at which liability protection of property interests would be proper.

## **B. Fourth Amendment Search and Seizure.**

### *1) A de facto liability rule.*

The Fourth Amendment creates a substantive individual entitlement “against unreasonable searches and seizures.”<sup>103</sup> There are two major competing views about how this entitlement must be protected. One theory, focused on warrants, results in something

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<sup>100</sup> *Id.* at 544.

<sup>101</sup> Mackey, 443 U.S. at 18-19 (holding that purely postdeprivation process for suspension of drivers license not unconstitutional despite argument that state could provide presuspension hearing).

<sup>102</sup> *Zinerman*, 494 U.S. at 136-37 (holding that property rule must govern institutionalization of mentally ill because it is not “impossible” to implement). *See also*, *Daniels v. Williams*, 474 U.S. 327, 342 (1986) (Stevens, concurring) (describing *Parratt* rule as applying to cases where use of property rules is “definitionally impossible”).

<sup>103</sup> U.S. CONST., amend. IV.

close to property rule protection. The other, focused solely on the substantive reasonableness of the search, leans towards a liability rule. The liability rule seems to be more sensitive to the underlying transaction costs.

The Supreme Court has said that the Fourth Amendment requires warrants for all to searches or seizures.<sup>104</sup> Prof. Amar has powerfully criticized this view, arguing that reasonableness is the sole criterion for permissible searches. A search pursuant to a warrant is presumptively reasonable, but an unwarranted search could also be reasonable. If the Fourth Amendment requires warrants, then it creates something close to property rule protection. A warrant requirement would protect against searches unless the individual entitlement-holder consents,<sup>105</sup> or the government condemns the entitlement by securing the *ex ante* approval of a judge. Because warrant hearings are conducted *ex parte* and the government need not prove its case beyond a reasonable doubt, the Fourth Amendment property rule is less robust than the property protection for the liberty of criminal defendants.<sup>106</sup> But the emphasis on *ex ante* approval, and the presumptive invalidity of a search that proceeds without such approval, makes the warrant requirement more a property rule than anything else. Furthermore, government officials are protected against subsequent tort suits when they act armed with a warrant. Thus the warrant clearly preempts liability rule protection.

The other view of the Fourth Amendment is that warrants are never *required*. The government can search when reasonable. If government officials acting without a warrant

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<sup>104</sup> See AMAR, *supra* note 3.

<sup>105</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 242-43 (1973) (“While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person’s voluntarily allowing a search.”).

<sup>106</sup> See text accompanying notes 28-30, *supra*.

act unreasonably and violate the Fourth Amendment rights, they must subsequently answer in damages. Thus without a warrant requirement, the government can search first and pay later, subject to the limitations of sovereign immunity. The nature of most searches and seizures is such that they cannot in practice be prospectively enjoined: they simply happen too fast, and often without warning. Injunctive relief will be elusive. Yet unwarranted searches can easily violate individual entitlements.

If the Fourth Amendment only requires that the search be reasonable, an issue that will only be litigated *after* the search, then it creates something that *in practice* works like a liability rule. To be sure, Fourth Amendment rights are nominally protected by property rules, because injunctive relief is theoretically available against illegal searches.<sup>107</sup> This is why the reasonableness-based Fourth Amendment is best understood as a *structural* liability rule. Because of the nature of the actions against which the entitlement protects, any rule that does not require *ex ante* process for conduct that may threaten the entitlement effectively pushes the protection closer to a liability rule. The liability rule is well-justified by transaction costs. It would, for example, be prohibitively expensive for police to seek a warrant before making a search incident to arrest. The costs of delay alone in such situations would exceed the social gains from searching.

2) *Between the Third and Fifth Amendments: a possible de jure liability rule.*

This raises the question of whether it makes sense to have even nominal property rule protection of Fourth Amendment rights – that is, whether injunctions should be

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<sup>107</sup> The Fourth Amendment says the entitlements “shall not be violated,” which has led many commentators to conclude that it must be protected with property rules. See AMAR, *supra* note 3, at 43. This conflates a remedy with a right. The substantive entitlement is clear, but because it is silent on the question of remedies, it is less clear whether an unreasonable search followed by a payment of just compensation can be considered a “violation” rather than a compensable taking of the entitlement. Because the right does not specify a mode for its protection, liability rule protection may not violate the right.

available in the rare cases where they can be obtained before the entitlement is taken.<sup>108</sup>

This will generally be in situations where a particular search policy or system is in place, rather than situations involving isolated or spontaneous searches. By looking at how transaction costs are dealt with in the Third Amendment and the Takings Clause – the provisions that explicitly choose between liability and property – might be a useful way of inferring the appropriate treatment of intermediate entitlements that leave remedies unspecified, like the Fourth Amendment.

Recall that the Third Amendment protects the anti-quartering entitlement with a property rule in peacetime, while the Fifth Amendment protects the property entitlement with a liability rule. What is striking is that the substantive entitlements are very similar in kind: they both protect against invasions and uses of one's real property by the government. Moreover, both entitlements are akin to the Fourth Amendment's protection of "homes" and "effects" – all of these amendments have been described as creating "constitutional property." Recall also the two main variables in choosing between liability and property rules: *ex ante* transaction costs, and *ex post* transaction costs, of which valuation difficulties are a significant component.

Some of the interests protected by the Third Amendment, such as the sentimental value of living in one's home, are difficult to accurately monetize. However, this cannot explain why the Third Amendment protects them with a property rule, because all of the same idiosyncratic valuations are implicated in eminent domain, where a liability rule is

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<sup>108</sup> Even Amar, famous for his endorsement of the tort model for enforcing Fourth Amendment rights, believes in the necessity of injunctive relief when possible. He does argue that *ex post* civil damages, rather than the exclusionary rule, should be the remedy for illegal searches when it is too late for an injunction. This is not about replacing the nominal property rule protection with a liability rule, but rather about the proper measure of *ex post* compensation when injunctions fail. Amar argues that exclusion is a bad measure of damages because it is always either undercompensatory (for the innocent) and overcompensatory (for the guilty). *See id.*

used. If it is hard to put a price on the inconvenience and sentimental loss from strangers in military helmets living in one's home, it is at least equally difficult to put a price on the inconvenience and sentimental loss from strangers in hard hats knocking down that home. The same applies to the Fourth Amendment – to strangers in police caps rummaging around one's home. Thus *ex post* transaction costs do not appear that different from the Third to the Fourth to the Fifth Amendment. The provision of a liability rule in the latter context suggests that the Constitution does not treat such injuries as posing insurmountable valuation difficulties.

Thus the Third Amendment's peacetime property rule is *solely* a function of very low front-end transaction costs; or conversely, the Fifth Amendment's liability rule is a response to particularly high *ex ante* transaction costs. In either case, it is not *ex post* valuation difficulties doing the work. Fourth Amendment anti-search rights, at least as applied to property, are similar in nature to those protected by the Third and Fifth Amendment and thus present similar valuation problems. The explicit remedial choices made by the Third and Fifth Amendments suggest liability rules for searches of real "houses" and "effects" would be proper when transaction costs are particularly high; and perhaps unconstitutional when, as in the peacetime Third Amendment, transaction costs are close to zero. Moreover, the Fifth Amendment's focus on eminent domain suggests that perhaps only certain types of transaction costs will justify liability rule protection – particularly, holdout problems. This view is confirmed by the Third Amendment's shift to a liability rule in wartime, when holdout problems are likely to arise.

The Fourth Amendment does not mandate liability rule protection, and it may be advisable to reserve it for exceptional situations with a transaction cost structure

analogous to eminent domain. Consider the following hypothetical. The police know that an escaped felon is hiding in the house of a friend in a particular city block, yet they have no information as to which house it is. Assume also that searching every house would be unreasonable under the Fourth Amendment. Every home owner could thus frustrate the entire search effort. The problem is one of adverse selection. While innocent homeowners would freely consent to a search, the government could not obtain the consent of those owners with something to hide, such as the owner sheltering the felon. At the very least, non-innocent owners would only agree to a search if paid compensation far above whatever a “market” rate would be for the search entitlement. In this situation, a socially optimal rule would allow the police to search and then pay a judicially-determined “fair” amount. To put it differently, liability rules can be reserved for situations where a search would be reasonable on a collective but not on an individual basis.<sup>109</sup>

### 3) *Liberty entitlements.*

The discussion thus far has been confined to *searches of things*, rather than *searches* or *seizures* of people. The latter involve liberty interests quite different from the property interests protected by the Third and Fifth Amendments. Courts face greater difficulties in accurately valuing liberty than property.<sup>110</sup> Thus it would take extraordinary *ex ante* transaction costs to justify a liability approach to liberty entitlements. To refer again to the Fifth Amendment, both liberty and property are protected against deprivation without due process; but the Takings Clause only mandates liability rules for property. This suggests that for remedial purposes, what will be true of searches of things under the Fourth Amendment will not necessarily be true of searches

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<sup>109</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 796-97.

<sup>110</sup> Part I.C, *supra*, discusses the particular valuation problems raised by liberty entitlements.



and seizures of persons. This distinction is made in current Fourth Amendment doctrine, which requires greater cause to justify a search or arrest of a person than a search or seizure of things. This difference in the scope of *substantive* anti-search entitlements may be a response to the greater difficulty involved in valuing liberty interests. But it is an awkward response, because it attempts to deal with remedial difficulties by adjusting the scope of the substantive anti-search right. This is again a result of constitutional law's ignoring the second dimension of entitlements. A system that reflects the same constitutional values but works in both dimensions would establish the same substantive standard of reasonableness regardless of the object of the seizure, but would protect persons with property rules and things with liability rules.

#### IV. LIABILITY RULES FOR GOVERNMENTAL ENTITLEMENTS

Thus far, this Article has dealt with liability rules for individual rights. However, constitutional law creates governmental "entitlements" as well.<sup>111</sup> These are the powers the government has to regulate individuals, either under the amorphous "police power" or pursuant to an explicit constitutional grant of authority, such as the Taxing power. As with individual rights, the government's entitlements are almost always protected by property rules: individuals cannot appropriate these powers from the government without the its consent. Some governmental powers are protected by inalienability rules: the government cannot sell or grant them.<sup>112</sup> It is unconventional to think about governmental

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<sup>111</sup> See Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 311-12 (1999) ("[C]riminal prohibitions, which are intended to protect the public as a whole, give rise to a societal right--the right to the non-breach thereof. . . 'entitlements' here are not necessarily the rights of individuals, as is typically the case with constitutional rights; they frequently belong to the state or to society at large.").

<sup>112</sup> The non-delegation doctrine can be understood as an inalienability rule for governmental entitlements. On the other hand, very few individuals rights are protected by inalienability rules. The Thirteenth

entitlements as being protected by liability rules<sup>113</sup>: constitutional rights are usually thought of as rights *against* the government.<sup>114</sup> However, in the First Amendment doctrine of prior restraint and the setting of bail under the Eighth Amendment, the government's regulatory entitlements are protected by *liability* rather than property rules.

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Amendment's ban on slavery is one of the few obvious inalienability rules for individual rights, as is the doctrine of unconstitutional conditions.

<sup>113</sup> For example, one of the only scholars to consider the possibilities of constitutional liability rules writes that "although it may be possible to imagine" that "an individual can acquire a constitutional right against the government by paying the government for the costs associated with its exercise," he concludes "such rules, *if any actually exist*... are rare." Merrill, *supra* note 2, at 1153 (emphasis added). Merrill suggests one possible example: a rule that permits groups to hold demonstrations in public streets providing they pay for the increased costs of providing police protection and litter removal, such as the one invalidated in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). See Merrill, *supra* note 2, at 1153 n.32. He recognizes that such an arrangement may be impermissible under current constitutional doctrine. What is more important for the present discussion is that this arrangement does not represent a "Rule Four" liability rule. A Rule Four policy would allow the protesters to have their demonstration without any prior approval or negotiation with the government; only after the demonstration could the government seek to charge the group for the costs they created, and a court could ultimately determine the appropriate level of compensation. In the system in question in *Nationalist Movement*, the county administrator determined the amount of the fee, and payment in advance was necessary to secure a permit. See *Nationalist Movement*, 502 U.S. at 126-27. Even if the administrator's calculations are based on the anticipated costs, this system represents a Rule Three property rule protection of the government's entitlement to make time, place and manner restrictions on demonstrations. The price of the entitlement is set by the government, and thus it represents its valuation, not an independent judicial valuation. Moreover, the government can presumably enjoin demonstrations that fail to secure the permit *in advance*, even if the demonstrators did not do so because they considered the fee extortionate. (And of course, violation of such an injunction would be subject to the collateral bar rule, under which a subsequent finding of unconstitutionality against the permit system or the particular price assessed would not be a defense to a contempt prosecution for violating the injunction.). The would-be demonstrators in *Nationalist Movement* apparently realized that the permit scheme was protected by property rule, because they did not demonstrate without a permit, which under Rule Four they could have done without fear of contempt. Instead, they abandoned their demonstration and challenged the permit scheme in court. *Id.* at 127.

<sup>114</sup> See Merrill, *supra* note 2, at 1152 (arguing that considering full range of entitlement/remedy combinations introduced in *The Cathedral* "makes no sense in considering constitutional entitlements, where the authoritative constitutional text itself establishes the menu of entitlements and who gets them – generally private persons who are subject to government regulatory power. . . . Thus an analysis that downplays the question of who gets the entitlement makes more sense here."). It bears noting that one of the two liability rules discussed in this Part, the prior restraint doctrine, is not established by "the authoritative constitutional text" but rather by judicial decision. It also happens to be the one constitutional liability rule discussed in this Article that is not justified by transaction costs. See text accompanying notes 129-141, *supra*.

### A. The Constitution's "Rule Four."

These liability rules for social entitlements correspond to Calabresi and Melamed's "Rule Four" entitlement-remedy combination. The best way to explain Rule Four is with Calabresi and Melamed's pollution example.<sup>115</sup> Under basic tort principles, which Calabresi and Melamed classify as "Rule One," the substantive entitlement related pollution is assigned to those harmed by the pollution (the pollutees). The pollutees' substantive entitlement to be free of pollution is protected by a property rule: the pollution can be enjoined as a nuisance. However, Calabresi and Melamed suggest another possible arrangement which they call "Rule Four." The entitlement is originally assigned to the polluter, but only protected by a liability rule. The pollutees can "buy out" the polluter's right to continue his harmful activities, even without his consent, but only by paying him judicially-determined compensation. Thus Rule Four is a private right of eminent domain over the polluting activities. This is useful in the rare situations where there is uncertainty as to whether the social costs of pollution exceeds the benefits of the pollution-causing activity, and the pollutees may be best situated to reduce the costs.<sup>116</sup>

Rule Four is almost never used in private law, and Calabresi and Melamed conceded that "it does not often lend itself to judicial imposition for a number of good legal process reasons."<sup>117</sup> It is equally rare in constitutional law, which has led an observer to posit its irrelevance in this context.<sup>118</sup> In private law, Rule Four is difficult to

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<sup>115</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1116-17. See also, *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

<sup>116</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1120-21.

<sup>117</sup> *Id.* at 1116.

<sup>118</sup> See Merrill, *supra* note 2, at 1152-53 (arguing that Rule Four is an "unnecessary appendage in the constitutional realm").

administer because it requires apportioning the costs of taking the polluter's entitlement across many pollutees, each of whom may have been harmed to a different extent.<sup>119</sup>

However, in constitutional law, Rule Four is used when it is an *individual* who might take the *government's* substantive entitlement under the liability rule. The full cost of the entitlement is paid for by the individual, so there is no apportionment problem.

## **B. Prior restraint.**

### *1) The doctrine.*

The First Amendment doctrine of prior restraint regards prospective restrictions on speech as presumptively invalid.<sup>120</sup> Not all speech enjoys First Amendment protection – speakers can be punished for, among other things, obscenity, libel, and incitement. But under the rule against prior restraint, the government can only impose sanctions for unprotected speech after it has occurred.<sup>121</sup> The doctrine, like the First Amendment itself, was originally intended to guard against newspaper licensing schemes and other methods of administrative censorship. Under 18<sup>th</sup> century licensing requirements, newspaper publishers had to obtain permission in advance from the government to print anything. However, the doctrine has since expanded to preclude courts from *enjoining* potentially unprotected speech, even in private defamation suits.<sup>122</sup> Commentators have been critical of the doctrine because judicially-imposed prior restraints do not share many of the

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<sup>119</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1116-17.

<sup>120</sup> See *New York Times*, 403 U.S. at 714 (per curiam) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

<sup>121</sup> See *Near v. Minnesota*, 283 U.S. 697, 721 (1931) (“The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments . . . as the privilege so limited would be of slight value for the purposes for which it came to be established.”); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 684 (1955) (“[R]estrictions which could be validly imposed when enforced by subsequent punishment are . . . forbidden if attempted by prior restraint.”).

<sup>122</sup> See *Near*, 283 U.S. at 721-23.

undesirable characteristics of licensing schemes.<sup>123</sup> However, despite these objections<sup>124</sup> the Supreme Court has continued to adhere to the broad prior restraint doctrine.<sup>125</sup>

Because it is hard to see any reason to be more solicitous of unprotected speech when it is embryonic than when it is fully hatched, the justification for the doctrine must lie primarily in its “chilling effect” on protected speech. Prior restraints may for various reasons cut too wide a swath, stifling protected speech along with unprotected speech.<sup>126</sup> Thus prior restraint is like overbreadth and vagueness – it saves unprotected speech (at least temporarily) so that protected speech may go free. As Justice Frankfurter has pointed out, this justification for the prior restraint doctrine is only somewhat coherent: any *ex post* criminal regulation of unprotected speech acts as a prior restraint by deterring lawful speakers who fear they may step over the line and face punishment.<sup>127</sup>

## 2) *Transaction costs justification.*

The prior restraint doctrine creates a liability rule by banning injunctions against harmful speech but allowing those injured by the speech to seek monetary damages after the fact.<sup>128</sup> Prior restraint applies to *unprotected* types of speech – speech that individuals

<sup>123</sup> See, e.g., Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 90 (1984) (“In most instances, judicially issued prior restraints on expression are no more harmful to first amendment interests than are subsequent punishment systems and therefore do not deserve the traditional disdain imposed by the prior restraint doctrine.”).

<sup>124</sup> See *id.*; John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982).

<sup>125</sup> *Alexander v. United States*, 509 U.S. 544, 550 (1993) (observing, anachronistically, that “court orders that actually forbid speech activities [] are classic examples of prior restraints.”).

<sup>126</sup> See Jeffries, *supra* note 124, at 425; 428-29 (criticizing the overbreadth and chilling effect rationales for prior restraint).

<sup>127</sup> *Kingsley Books v. Brown*, 354 U.S. 436 (1957). See also, Randy Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977).

<sup>128</sup> A few scholars have recognized this point. See Bendor, *supra* note 111, at 312-13 (“The constitutional bias against prior restraints results in the use of liability rules to protect civil law anti-speech entitlements. . . [A] party interested in impairing an anti-speech entitlement has the power to do so, but in return he or she

do not have a constitutional entitlement to make. Thus the liability rule protects *society's* entitlement to be free of certain types of speech, or to put it differently the government's right to regulate certain types of speech for the benefit of society.<sup>129</sup> Under the prior restraint doctrine, this anti-speech entitlement cannot be protected through injunctions, even in advance of an imminent harm. Rather, the speaker can forcibly “take” the anti-speech entitlement and then pay satisfaction to the injured individual or the public, either through civil damages or jail time.<sup>130</sup>

What must now be considered is whether this somewhat unusual arrangement reflects the underlying transaction costs. It will be useful to put anti-speech entitlements into one of two categories, each typified by a landmark prior restraint case: individual entitlements such as the right to be free from defamation (*Near*) and collective ones such as the right to be free from speech that undermines national security (*Pentagon Papers*). Liability rules become increasingly attractive as *ex ante* transaction costs increase, and as the difficulty of valuing the entitlement decreases. When the anti-speech entitlement is individual, there are relatively few barriers to efficient bargaining between a prospective taker of the entitlement (the libeler or slanderer) and the person whose reputation would be harmed. The entitlement holders are few, their identities known in advance, and they

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must pay the holder of the entitlement compensation at a rate determined by the state.”); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 64 (1994) (“Integral to the resolution of the conflict between the right of publicity and the First Amendment is the recognition that certain situations will be most effectively resolved by a liability rule approach in which a successful right-of-publicity plaintiff is awarded damages rather than injunctive relief. This approach is consistent with constitutional doctrine which holds that prior restraints of speech are particularly offensive to First Amendment values.”).

<sup>129</sup> See Bendor, *supra* note 111, at 312-13 (“[I]ndividuals, society, and the state have certain ‘anti-speech’ entitlements, or entitlements that require limitation of the speech rights of others.”).

<sup>130</sup> See *id.* (“Without the doctrine of prior restraint, the holder of the [anti-speech] entitlement could refuse to sell it, or at the very least, could hold out for the price that he or she deemed satisfactory. . . . Instead, the victim of a libel is entitled to compensation from the person harming him or her at a rate that is determined by the court.”).

can be negotiated with directly. Thus if the prospective speaker fails to secure the consent of the entitlement-holder in advance, it implies that the latter places a higher value on the speech than does the former. A forcible transfer of the entitlement would be inefficient. So in *Near*-type cases, transaction costs do not justify the ban on prior restraints.<sup>131</sup>

The transaction cost calculation is different when collective or social entitlements are involved. Too many people are harmed by national-security impairing or obscene speech for the speaker to be able to identify them in advance, let alone negotiate with them for the taking of the entitlement. Furthermore, the members of the large and diffuse injured group will face severe coordination and holdout problems.<sup>132</sup> Under a property rule, these transaction costs would prohibit efficient *ex ante* deals; they would block speech from ever being made even when the speaker is willing to pay the full social cost. So at first glance, the prior restraint liability rule makes sense for speech that violates communally-held anti-speech entitlements.<sup>133</sup>

Yet this is not fully satisfactory. While “society” is too diffuse to bargain with, it has appointed a unitary agent to enforce its anti-speech entitlements – the government. After all, the publisher of obscenity or national security-compromising materials ultimately pays sanctions to the government, not society. And government – the centralization of collective entitlements for bargaining purposes – is a classic solution of both holdout and free-rider problems. Thus government enforcements of collective anti-speech entitlements greatly reduces transaction costs.

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<sup>131</sup> *Id.* at 317.

<sup>132</sup> *Id.* (“The cost of gathering the members of a large group is huge, and sometimes such an operation is logistically impossible. Moreover, the completion of the transaction is contingent upon the separate consent of each member of the group; each of them is therefore in a position to extort in a manner that will yield her profits at the expense of the other parties.”).

<sup>133</sup> *Id.*

However, the government is not society. It is merely an imperfect agent for society.<sup>134</sup> The government may not properly internalize costs when taking land under the eminent domain liability rule.<sup>135</sup> Similarly, it is not clear whether it has proper incentives to accept an efficient payment from a prospective speaker in exchange for giving up its anti-speech entitlement. Under a property rule the government might sometimes refuse reasonable compensation out of self-interested political motives; *Pentagon Papers* again comes to mind.<sup>136</sup> Still, it is far from clear that concern about agency problems should dictate the choice between liability and property rules in the Free Speech context when they do not in the Takings context. The political process is the primary mechanism for policing against agency problems in government.<sup>137</sup>

To fully evaluate the prior restraint liability rule, the administrative and error costs involved in judicially valuing the entitlement must also be considered.<sup>138</sup> The social harm caused by disclosure of national secrets or obscenity are diffuse and inchoate, and thus hard to measure. Because these entitlements are not traded in markets (and are not even analogous to common law torts) courts cannot use market prices to determine damages. Thus judicial valuations of the entitlement will be highly error-prone. Another problem with the liability rules may involve the magnitude of the harm. The potential

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<sup>134</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 776-7.

<sup>135</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000) (arguing that government does not fully internalize costs as private actors do, and thus requiring government to pay compensation does not affect its conduct as much as it would a private actor).

<sup>136</sup> See *New York Times*, 403 U.S. at 734-24 (Douglas, J., concurring) (“The dominant purpose of the First Amendment was to prohibit . . . governmental suppression of embarrassing information. . . . The present cases will, I think, go down in history as the most dramatic illustration of that principle.”).

<sup>137</sup> See Kontorovich, *Liability Rules*, *supra* note 5, at 777.

<sup>138</sup> One commentator maintains that these entitlements are “incommensurable” and thus inappropriate for liability rules. See Bendor, *supra* note 111, at 318-20, 322-23. One need not adopt the metaphysical language of incommensurability to come to the same conclusion.



speaker may be judgment-proof, unable to pay compensatory damages for some collective entitlements. For example, the inciter may not be able to afford the costs of the riot, all difficulties of valuation aside. National security prior restraint cases like *Pentagon Papers* and *Progressive*<sup>139</sup> are even clearer examples of cases where if the threatened harm transpired, the speaker would not have the resources to pay for it. Criminal enforcement becomes an attractive substitute for liability rules in such situations, as *The Cathedral* pointed out.<sup>140</sup>

In sum, the prior restraint doctrine creates a liability rule, but it is not a response to heightened transaction costs. In the case of individual anti-speech entitlements, *ex ante* transaction costs are quite low, and the existence of government substantially reduces transaction costs for collective anti-speech entitlements. Moreover, the latter type will be difficult for courts to value, further weakening the case for liability rules. Valuation difficulties aside, the absolute size of the injury may be high enough that most potential speakers would be judgment-proof. The potential concern about using a property rule would be that the government would for self-interested political reasons withhold consent to socially efficient takings of its anti-speech entitlement.

### 3) *Flipping the entitlement.*

While the prior restraint doctrine is not justified by the underlying transaction costs, *The Cathedral* suggests an alternative entitlement/protective rule structure that would allow the doctrine's substantive goals to be realized. The prior restraint doctrine

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<sup>139</sup> *United States v. Progressive, Inc.*, 486 F.Supp. 5, 9 (W.D. Wisc. 1979) (reaffirming injunction against publication of magazine article explaining how to build a hydrogen bomb because it would "likely cause direct, immediate and irreparable injury to this nation"); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979) (granting preliminary injunction despite concluding that it is a First Amendment prior restraint).

<sup>140</sup> See Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1125 n.69.

prevents the government from enjoining publication, but allows it to impose fines afterwards. A more efficient way of preventing First Amendment “chilling affects” would be to flip the entitlement. The substantive right would be initially allocated to the speaker, who could make even non-protected speech. However, the government could forcibly condemn this entitlement. In other words, the government *could* enjoin publication – “take” the entitlement -- but would then have to pay judicially-determined damages if a court subsequently found the speech to be constitutionally protected.<sup>141</sup>

*Pentagon Papers* shows the utility of the flipped approach. The Court thought the only alternatives were to allow the prior restraint or to allow publication. Given the national security stakes involved, this left several justices visibly conflicted and resulted in a weak *per curiam* decision with nine separate opinions, none commanding five votes. Now imagine if the entitlement were flipped. The court could have sustained the prior restraint, but the *Times* would be able to subsequently sue for damages, and with the urgency of the enjoin-or-allow decision having faded, the merits could be more carefully considered.

This would also have avoided a chilling affect on protected speech. Newspapers are commercial enterprises run for profit, often with publicly-traded shares (although published news has public good characteristics and may create positive externalities). They respond to financial incentives. The prospect of eventually receiving compensatory damages for an injunction against protected speech would ensure that newspapers would not be deterred from investigating and publishing such stories in the future. Newspapers would have full incentive to pursue stories that fall within the realm of protected speech

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<sup>141</sup> Professor Merrill has suggested a similar approach in the specific context of tobacco advertising. See Merrill, *supra* note 2, at 1199-1204 (suggesting that government could “condemn the tobacco companies’ right to advertise in return for the payment of just compensation”).

because they would be compensated for their investment either directly, through publication, or indirectly, through damages. Thus the government's security interests would be vindicated without compromising First Amendment values.

Another advantage of this approach is that the newspapers' damages are easier to compute than the government's.<sup>142</sup> As has been discussed, it is difficult to accurately monetize the value of intangible interest such as national security secrecy and decent speech. It is much easier to determine a newspaper's loss from having a speech entitlement condemned. One might look at the projected increase in sales from running a scoop, how much additional advertising revenue it would generate, in addition to publicity value for the paper. Such things could be measured by looking at past experience with similarly sensational stories.<sup>143</sup>

Furthermore, while anti-speech entitlements like national security secrecy and obscenity may be hard to value, the government will probably possess *better* information about the scope of the potential harm than would the would-be speaker.<sup>144</sup> Under the prior restraint doctrine, imperfect information may make it hard for a speaker to know whether to publish or not, because of uncertainty about the size of *ex post* sanctions. This uncertainty may itself chill speech. Yet if the government were the one taking a speech

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<sup>142</sup> See generally, Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1120-21 (noting that whether the polluter or pollute should be protected by liability rule depends in part whose entitlement is easier to value through the judicial process).

<sup>143</sup> Prof. Merrill has argued that it would be possible to establish market values for commercial speech, that is, advertising: "The ability to put a monetary value on commercial speech rights reminds us that commercial advertising has always had a dual nature: part commerce and part speech, or really both at once . . . The commerce side of commercial speech renders it, unlike many other constitutional rights, subject to government condemnation." See Merrill, *supra* note 2, at 1202-03. From the perspective of incentives, this point goes beyond the First Amendment category of commercial speech to any speech made for business purposes.

<sup>144</sup> See generally, Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1119-20 (discussing relevance of asymmetrical transaction costs to allocation of entitlement and choice of protective rule).

entitlement under a liability rule, it could use its superior (but often classified) knowledge about the size of the social injury. This would make it more likely that the entitlement would be transferred when, and only when, it is socially efficient.<sup>145</sup>

A major drawback of the flipped entitlement approach would be the creation of moral hazard. If newspapers were entitled to payment for suppressed *unprotected* speech, they might devote more resources to digging up national security secrets and obscene matter. They could prepare an edition full of incitement to violence and have the government “buy it out.” This problem stems from the odd feature of prior restraint law – that it applies to unprotected as well as protected speech. Flipping the entitlement simply relocates the perverse consequences. Under a flipped liability rule, the government should only have to pay for condemnation of *protected* speech; otherwise the moral hazard problems would be insurmountable. If the speech turns out to be unprotected, the government would be free to pursue civil and criminal sanctions against the speaker, thereby reducing moral hazard.

The moral hazard problem suggests the flipped entitlement approach should not be used in all contexts. But it could be appropriate for borderline cases where it is difficult to determine, especially in the hurry of an equitable proceeding, whether speech enjoys First Amendment protection. For example, in *Pentagon Papers* several justices admitted that the matter ripened too quickly for them to be able to get a good grip on the

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If the courts are very uncertain about the correct analysis of external costs and benefits, a liability rule provides a mechanism for assuring that the correct conclusion has been drawn. Under a liability rule, the government must compensate the rightsholder for the private value of exercising the constitutional right. Insofar as the government seeks to obtain the maximum benefit from its expenditure of public funds, the government will condemn and compensate only if the social benefits of extinguishing the right exceed the private value of the right.

See Merrill, *supra* note 2, at 1201.

merits.<sup>146</sup> The justices were divided on whether the speech fell within the First Amendment's substantive protection. When it is unclear whether an individual has a substantive speech entitlement (protected by a property rule) or the government has the corresponding anti-speech entitlement (protected by a liability rule), the best compromise may be to presume that the individual has the entitlement but to only protect it with a liability rule. By extension, the flipped-entitlement approach could be useful for borderline *categories* of speech, where doctrine is in flux and the scope or existence of substantive protection is uncertain.<sup>147</sup>

### C. Bail.

#### 1) *The liability rule.*

The Eighth Amendment provides that “Excessive bail shall not be required.”<sup>148</sup> This establishes a liability rule for the government's entitlement to detain people between arrest and conviction. The government is allowed to hold defendants pending trial. The defendants, however, can buy out the government's detention right without its consent. To see the liability rule clearly, imagine if the government's entitlement were protected by a property rule. A defendant would have to negotiate directly with the U.S. Attorney

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<sup>146</sup> See *New York Times*, 403 U.S. at 725 (Brennan, concurring) (noting the “the necessary haste with which decisions were reached” and “the magnitude of the interests asserted”); *id.* at 748 (Burger, C.J., dissenting) (“These cases are not simple for another and more immediate reason. We do not know the facts of the cases. . . I suggest we are in this posture because these cases have been conducted in unseemly haste. . . It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases.”).

<sup>147</sup> See *id.* at 1202 (“Liability rules [for speech entitlements]. . . may be particularly appropriate where there is a high level of uncertainty about whether a police power rule should apply [that is, whether the speech should be protected in the first place].”)

<sup>148</sup> U.S. CONST., amend VIII.

for a “bail bargain,” much as they now negotiate for “plea bargains.”<sup>149</sup> The amount of bail would be determined, if at all, by agreement. However, the Eighth Amendment generally allows suspects to bypass such negotiations, and to obtain their liberty pending trial by paying a judicially-determined amount. Thus the prohibition on “excessive bail” is the counterpart of the Fifth Amendment’s requirement of “just compensation”: the judge ensures the price of the entitlement is close to its “market” value.

Of course, the way bail is popularly conceptualized is that the government does not have a “right” to detain people pending trial because the Constitution gives people a “right” to bail. This is a doctrinal error; individuals can be denied bail.<sup>150</sup> But the error stems largely from confusing rights with remedies. The government’s pre-trial detention right is not recognized as an entitlement precisely because the liability rule makes transfers relatively easy and thus the entitlement rarely stays in its default position. (In the unusual situations where bail is not available, as can happen for capital offenses, the government’s entitlement *is* protected with a property rule.<sup>151</sup>) Nor does the government have a entitlement to detain people only when they pose a flight risk or other danger to

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<sup>149</sup> The Supreme Court has left it unclear whether the Bail Clause applies to the states through the incorporation doctrine. *See* Nelson Lund, *The Past And Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 49 n.112 (1996) (“Since the process of incorporation began, the Court has apparently not had an occasion to decide whether the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment or the Third Amendment should be applied against the states.”).

<sup>150</sup> The Excessive Bail clause only governs the amount of bail in those cases where bail is required, but does not require bail in all cases. *See* *United States v. Salerno*, 481 U.S. 739, 752 (1987) (“This Clause, of course, says nothing about whether bail shall be available at all.”); *Carlson v. Landon* 342 U.S. 524, 545-546 (1952) (“The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death.”); *United States v. Abrahams* 575 F.2d 3, 5 (1<sup>st</sup> Cir. 1978) (“The eighth amendment proscribes excessive bail, but it does not mandate that a defendant be allowed bail in all cases.”). *See also*, *Sellers v. United States*, 89 S.Ct. 36, 38 (1968) (Black, J., in chambers) (“The command of the Eighth Amendment . . . obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons.”). For example, capital offenses are traditionally nonbailable. *See* *Salerno*, 481 U.S. at 753 (“A court may . . . refuse bail in capital cases.”).

<sup>151</sup> Presumably judges would not deny bail if the prosecution thinks some high level of bail is appropriate.

society. It has an entitlement to detain under all circumstances, and things like risk of risk just affect the price at which the individual can force a taking against the government.

Consider the case of someone who poses no flight risk, and so his bail is set at one dollar.

The suspect remains in jail unless he affirmatively chooses to post the bail.<sup>152</sup> This demonstrates that the broad detention entitlement is initially assigned to the government.

2) *Transaction cost justification.*

The Bail Clause's liability rule can be understood as a response to monopoly power on the government's side. It is not clear that monopoly power would block socially efficient transactions (bail releases), but it would affect how any surplus is distributed between the government and bailees.<sup>153</sup> Thus the purpose of the Eighth Amendment's bail provision could be merely distributional.

When an entitlement belongs to the government, as in the bail context, many individual defendants must deal with a single, unified entitlement-holder. The presence of a monopolist on one side of the transaction does not mean that a socially efficient bargain can't be reached. It is in the monopolist's interest to make a deal. His monopoly power will simply lead him to charge an supercompetitive price and thus expropriate most of the social surplus. Typically a monopolist reduces output to increase prices, and in such cases monopoly has both distributional and efficiency affects because supply is suboptimally

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<sup>152</sup> See, e.g. *Tatum v. Morton*, 386 F. Supp. 1308, 1310 (D.D.C. 1974) (arrestees held overnight in jail when they refused to post \$10 bond because they said they "would not participate in the bail system which discriminated against persons without sufficient money to 'buy' their release"). In *Tatum*, the Court ruled that the arrestee's refusal to post such a "trifling" bond represented a failure to mitigate damages arising from an unlawful detention, especially given that it would not have "compelled plaintiffs to compromise or sacrifice any rights." Thus plaintiffs could not recover damages for prolongation of detention past the point at which they could have posted the bond. *Id.* at 1312.

<sup>153</sup> For a model of optimal bail illustrating the surplus created when bail is set at a level equating the marginal benefit of release with the marginal cost, see William M. Landes, *The Bail System: An Economic Approach*, 2 J. LEG. STUD. 79, 86-88 (1973) [hereinafter, Landes, *Bail System*].

low. Such a strategy would not work for bail because each arrestee's bail is a unique good: denying one person bail would not affect the price of another person's bail. In the bail context, the government's monopoly pricing strategy would be to charge each defendant his reservation price (assuming it is above the cost of bail to the government).

The consequences will be purely distributional: monopoly will not block socially beneficial bail transactions, but will allow the government to keep for itself all the benefits. The Bail Clause changes these distributional consequences and ensures that the bailee receives some portion of the surplus.<sup>154</sup> This is an understandable policy choice for the Framers to have made. The government is created to serve the needs of individuals by making collective action possible. Thus it should not seek to maximize its own utility at the expense of individuals. Thus while bail can be set at a *socially* optimal level, it should not be set any higher. Put differently, the role of the Bail Clause is analogous to that of a corporate by-law requiring regular dividend payments.

There may be an even more vexing agency problem involved, one that could block socially efficient bail transactions and provide an alternate or additional transaction cost explanation for the Bail Clause. Society benefits both from convicting criminals and, all else equal, from releasing them on bail. An optimal bail system would take into account both considerations. But society's agent, the U.S. Attorney, has a utility function that diverges from the principal's. The prosecutor's goal is to win convictions. This purpose can best be served by keeping all defendants in jail until trial.<sup>155</sup> Thus the U.S.

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<sup>154</sup> See generally, Calabresi & Melamed, *The Cathedral*, *supra* note 1, at 1099-1101 (discussing relevance of distributional concerns to establishment of entitlements).

<sup>155</sup> Indeed, the prosecutor may have a greater chance of winning a conviction if the defendant is not released, because it reduces his ability to assist in his defense. See William M. Landes, *An Economic Analysis of the Courts*, 14 J. LAW & ECON. 61, 72-32 (1971).



Attorney has no obvious incentive to reach a bail deal with any defendant. On the contrary, he has an incentive to demand unnecessarily and inefficiently high bail.<sup>156</sup> Of course, the government must pay for the costs of incarceration, but it is not clear to what extent the U.S. Attorney internalizes these costs. Nor is it clear whether he internalizes any benefit from the forfeiture of bail posted by defendants who fail to appear. (This would depend in part on whether forfeited bail went into the prosecutor's budget or into general court funds.)

This again is the government-as-imperfect-agent problem discussed earlier in relation to prior restraint.<sup>157</sup> In that context, this Article suggested that a liability rule is not obviously the response to the problem. However, in the bail context, agency costs will regularly be much higher than in prior restraint. The agency problem in prior restraint -- the reason the government might refuse to give up its anti-speech entitlement even when it would be socially beneficial to do so -- would arise only when the potential speech is both arguably unprotected and embarrassing to government officials. Such cases are rare, and account for a tiny proportion of the situations where the prior restraint doctrine applies. A prosecutor, however, faces his agency problem in every single bailable case, because bail and conviction are possibilities in every such case.

To conclude, the Eighth Amendment works to prevent prosecutors from using their monopoly power to appropriate all of the social benefits from the bail system. This function is purely distributional: it does not affect social efficiency. However, if there is a significant principal-agent problem with prosecutors such that they care about the social benefits of conviction and not the social benefits of bail, then the Bail Clause also works

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<sup>156</sup> See Landes, *Bail System*, *supra* note 153, at 96.

<sup>157</sup> See text accompanying notes 134-137, *supra*.

to ensure that these agency costs do not block socially beneficial transactions. In this case, it would have efficiency benefits as well as distributional consequences.

3) *Flipping the entitlement.*

Another way to examine the economic purpose of the Excessive Bail Clause is to consider why the Constitution's purposes could not have been served by the *opposite* liability rule. Under such a rule, defendants would be presumptively free until trial, but the government could "take" defendants' entitlement to pretrial liberty by forcibly detaining them and paying just compensation.<sup>158</sup> The chief difference with this system would be in what courts are asked to monetize. Under the present bail system, courts attempt to set bail at a level equal to society's interest in the bailee's appearing at trial,<sup>159</sup> and possibly its interest in him not committing crimes while released. A reverse bail system would have to put a monetary value on the cost of detention to the bailee. The amount paid would have to be less than in the present defendant-pays system for

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<sup>158</sup> A reverse-bail system is admittedly fanciful, and is suggested here purely as a counterfactual hypothetical. Scholars have considered similar alternatives to the present bail system. Professor Landes has examined the property rule version of a reverse-bail system; under that regime, the defendant could choose between remaining and jail while being paid compensation, or going free until trial but not receiving compensation. See Landes, *Bail System*, *supra* note 153, at 93. A similar scheme was discussed in GORDON TULLOCK, *THE LOGIC OF LAW* 194-95 (1971). Landes concludes that such a system would perform at least as well as the present one, but "voluntary bail" would be better for those who do not make bail under the current system. See Landes, *Bail System*, *supra* note 153, at 94-95, 102-03. He also suggests that something like the liability rule version of reverse bail would be necessary in some situations. Under reverse bail, more dangerous defendants would have to be paid more compensation if they choose to stay in jail; the worst offenders could receive "large and possibly infinite" payments. To avoid this, Landes suggests modifying the purely voluntary reverse-bail system so that highly-dangerous defendants could be detained without their consent, with caps put on the amount of compensation they could receive. See *id.* at 96. He suggests, however, that this would be in tension with the presumption of innocence.

<sup>159</sup> Bail, properly set, is approximately the amount required to secure the defendant's appearance at trial. See WILLIAM BLACKSTONE, 3 *COMMENTARIES ON THE LAWS OF ENGLAND* 297 (facs. ed. 1767) (observing that government's "purpose" of securing appearance at trial "is equally answered" through detention or bail). For a more refined model, see Landes, *Bail System*, *supra* note 153, at 83-86.

otherwise it would provide a windfall to dangerous people and flight risks, thus creating a significant moral hazard.<sup>160</sup>

Determining the amount to be paid to the defendant would be quite complicated. The magnitude of the valuation problem is a consequence of bail protecting several different *interests*, most of them inchoate. Accurate compensation would have to account for all them.<sup>161</sup> Bail is useful to the defendant because it allows him to be free. But the liberty interest is particularly difficult to value.<sup>162</sup> The defendant's wage rate could at best be a poor approximation (not the least because most jobs involve non-pecuniary compensation, such as enjoyment, higher than that offered by jail time).<sup>163</sup> A less obvious function of bail is to allow the bailee an opportunity to assist in his own defense by freely meeting with counsel and by not having the pallor of the cell upon him when he comes before a jury. This interest is even harder to value because it is contingent – if the defendant is not given bail and subsequently convicted, it would be hard for a court to reconstruct whether his inability to assist in his defense was a necessary ingredient in his conviction, or whether he was just factually guilty.

It is not clear whether society's interest in bail is easier for a judge to monetize than the individual's interest.<sup>164</sup> However, it is not implausible that the individual's interest will be more difficult to value. Thus the form of the current bail system – a liability rule for a detention entitlement originally assigned to the government – could be

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<sup>160</sup> *See id.*

<sup>161</sup> *See* AMAR, *supra* note 3 (explaining that to determine the proper remedies for Fourth Amendment violations, one must first determine the underlying interests it protects).

<sup>162</sup> Part I.C, *supra*, discusses the particular valuation problems raised by liberty entitlements.

<sup>163</sup> Landes notes that voluntary reverse bail would have the beneficial effect of giving authorities an incentive to improve prison conditions, because that would lower the amount of compensation each defendant would have to be offered. *See* Landes, *Bail System*, *supra* note 153, at 96-97.

<sup>164</sup> Landes does not consider valuation difficulties for either interest.

understood as a response to these asymmetric *ex post* transaction costs. Finally, liability rules may be particularly appropriate for bail because it seeks to accommodate conflicting private and public interests within one rule.<sup>165</sup> Of course, attempts to reconcile conflicting legitimate interests are ubiquitous in the law. In bail, however, the effort is made to reconcile these interest within each individual case, not across a wide swath cases. In such situations, where a balance must be struck within individual cases, liability rules have advantages, as they are more flexible than property rules.<sup>166</sup> Injunctions are all-or-nothing, but money can be more or less, and is thus better suited to fine adjustments between competing interests.

## CONCLUSION

Constitutional law has long been regarded as a field where only property rules can apply. Yet only two constitutional provisions choose between liability and property, with the Takings Clause adopting the former, and as has been show here, the Third Amendment adopting the latter. For other entitlements, the Constitution makes no explicit choice. This shows that for entitlements where remedies are not specified, both options are open, as well as creative mixtures of the two. Thus liability rules are fully compatible with the Constitution.

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<sup>165</sup> *Faheem-El v. Klinciar*, 841 F.2d 712, 719 & n.10 (7<sup>th</sup> Cir. 1988) (en banc) (“Bail, as frequently noted, involves a struggle to reconcile competing interests.”), citing Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right To Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329-30 (1982) (“Bail acts as a reconciling mechanism to accomodate [sic] both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial.”).

<sup>166</sup> See generally, Kontorovich, *supra* note 5 at 798-801 (discussing use of liability rules to reconcile competing interests in a given case, with particular attention to liberty entitlements). See also, Bell & Parchomovsky, *supra* note 9, at 67-68.

The amenability of constitutional entitlements to liability protection is not merely a theoretical innovation. Rather, this Article has shown that liability rules are in fact found throughout constitutional law. Of course, this Article does not purport to be comprehensive: the liability rules identified here do not necessarily exhaust all those that can be found in constitutional doctrine. Indeed, there may be constitutional entitlements that currently receive property rule protection but that should, under the considerations described in this Article, receive liability protection instead. This Article's identification of existing liability rules should be a good point of departure for investigations into desirable but not-yet-existing liability rules.

The awareness of the second dimension of constitutional law draws attention to the economic structure of constitutional remedies – to holdout problems, imperfect information, valuation difficulties, agency costs, and related considerations typically obscured and overlooked by purely substantive discussions of constitutional rights. Determinations about how broad constitutional rights should be are in an important sense political or philosophical questions. Economic tools, however, help reveal the best methods to enforce already-defined entitlements.